

1                               IN THE UNITED STATES DISTRICT COURT  
2                               FOR THE DISTRICT OF NEW JERSEY  
3                               CIVIL NO. 06-01051  
4       NXIVM CORPORATION, formerly known as:  
5       EXECUTIVE SUCCESS PROGRAMS, INC. and:  
6       FIRST PRINCIPLES, INC.,                               :  
7                               Plaintiffs,                               :  
8               -against-                               :  
9       STEPHANIE FRANCO                               :  
10                               :  
11                               :  
12                               :  
13                               Defendants.                               :  
14                               x

15                               Newark, New Jersey  
16                               June 9, 2017 2 p.m.  
17       B E F O R E:  
18       THE HONORABLE KATHARINE S. HAYDEN, U.S.D.J.  
19       A p p e a r a n c e s:

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20                               Pursuant to Section 753 Title 28 United States Code,  
21       the following transcript is certified to be an accurate  
22       record as taken stenographically in the above-entitled  
23       proceedings.

24                               s\ RALPH F. FLORIO  
25                               Official Court Reporter

U.S. DISTRICT COURT, NEWARK, NEW JERSEY 07101

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1           THE COURT: Good morning. Let's have appearances  
2 on the record first.

3           MR. MCGUIRE: Good morning, your Honor. Grant W.  
4 McGuire, Thompkins, McGuire, Wachenfeld & Barry on behalf of  
5 the NXIVM parties-- the plaintiffs.

6           THE COURT: Thank you.

7           MR. SYLVESTER: Good morning, your Honor. Sherman  
8 Wells, Anthony Sylvester.

9           May it please the Court, joining me at counsel  
10 table, and are our colleagues Ms. Shadek and Mr. Valenziano.

11          THE COURT: Thank you. Mr. McGuire.

12          MR. MCGUIRE: Thank you, your Honor. A couple of  
13 issues. I was just hoping to establish something of a  
14 batting order for today's proceeding, since there are quite  
15 frankly a number of issues, whether it is a Daubert hearing.

16          Mr. Sylvester's Rule 26 application, Mr.  
17 Sylvester's Rule 41 application yesterday, just to get an  
18 idea of how we're going to deal with that.

19          THE COURT: Well, I think we've got two basic  
20 procedural issues. One I would call the Daubert, a  
21 substantive issue. So we'll do the procedural issues first.  
22 It seems to me that an involuntary dismissal should be our  
23 first order of business, because if it's successful then we  
24 don't have to do anything else.

25          And then to the extent the Rule 26 is bound up in a

1 Daubert hearing, I'll hear the arguments on the Rule 26 and  
2 see how much they affect the Daubert issue. Are the experts  
3 here?

4 MR. MCGUIRE: Mr. Smith is here.

5 THE COURT: And Mr. Sylvester.

6 MR. SYLVESTER: We are not presenting an expert,  
7 your Honor.

8 THE COURT: You will be cross examining and raising  
9 the issues based upon Mr. Smith's testimony. Is that it?

10 MR. SYLVESTER: That's correct.

11 THE COURT: Okay. That's fine. Let's start with  
12 the involuntary dismissal.

13 MR. MCGUIRE: Your Honor, there are two other minor  
14 housekeeping issues, if I may.

15 THE COURT: Go right ahead.

16 MR. MCGUIRE: First, the letter submitted on  
17 December 27, inquiring as to whether or not Mr. Crockett  
18 could be involved in today's proceedings-- remotely. And it  
19 was my understanding that it was the Court's preference not  
20 to involve Mr. Crockett via skype on an examination of a  
21 witness. So that is off the table.

22 Does the Court have a position on Mr. Crockett's  
23 ability to argue legal issues via telephone.

24 THE COURT: Why would he do that? He is not here.

25 You mean argue the Rule 26 and the other legal

1 issues?

2 MR. MCGUIRE: Yes, your Honor.

3 THE COURT: No. Mr. McGuire, you have my complete  
4 respect. I believe that you are perfectly capable of doing  
5 that. I think you know that you are perfectly capable of  
6 doing that. And if there is some unhappiness in terms of  
7 NXIVM clients, your firms been involved with them for  
8 ten-plus years. So there's no basis for us to go through  
9 that kind of a cumbersome accommodation.

10 MR. MCGUIRE: Just so the Court understands where I  
11 am coming from, your Honor, and trying to keep complete  
12 candor with the Court. My motivation, and the client's  
13 motivation, quite frankly, it's their preference to have Mr.  
14 Crockett involved as much as possible. And I understand the  
15 Court's ruling. I will be arguing and presenting Mr. Smith.

16 The final housekeeping issue has to do with two  
17 pending motions sealed, and some of the materials that will  
18 be addressed via Mr. Smith's testimony, such as his report  
19 and his declarations are under seal.

20 This case has been proceeding under a  
21 confidentiality protective order since nearly the very  
22 beginning. I believe it's Docket Number 81.

23 My concern is that if Mr. Smith is going to be  
24 testifying as to the specifics of what are in those  
25 materials, I am able and somehow waiving that motion to

1 seal. So I have concerns about the courtroom.

2 THE COURT: Well this case is so old that the law  
3 of sealing records and confidentiality and protective orders  
4 has literally undergone, at least from my prospective, a sea  
5 of change. It may well be that counsel, both sides, if both  
6 sides are anxious to seal, counsel may have to represent the  
7 issue to Magistrate Judge Waldor with respect to whether we  
8 continue that order or how we should deal with the transcript  
9 of today's proceedings and so on.

10 Right now it's an open court. Who is here? Why--  
11 do we have people? Are members of the public pushing through  
12 the door? Or is everybody attached to each side? Tell me  
13 who is here?

14 MR. MCGUIRE: Very well, your Honor. Obviously,  
15 Magistrate Waldor and her staff I have zero concerns about,  
16 which are part of the court.

17 JUDGE WALDOR: I am glad to hear that.

18 MR. MCGUIRE: We have Mr. Englander, who I am sure  
19 the Court would remember is counsel for Interfor.

20 THE COURT: Right.

21 MR. MCGUIRE: Interfor was part of the protective  
22 order. So I am certain Mr. Englander would subscribe to the  
23 existing protective order.

24 MR. ENGLANDER: That's correct.

25 THE COURT: Yes.

1 MR. MCGUIRE: Mr. Skolnik, who is counsel for Mr.  
2 Ross, is also subject to confidentiality order.

3 MR. SKOLNIK: Good morning, your Honor.

4 THE COURT: And next to Mr. Skolnik is Philip  
5 Elberg, who was in this case quite sometime ago. To be  
6 honest with you, I am sure, if he was-- if he ever subscribed  
7 to the protective order. And I am not asking Mr. Elberg to  
8 go under oath, or anything like that, but hopefully get a  
9 representation as to his status.

10 MR. ELBERG: Good morning, your Honor. I represent  
11 a witness in this case who was served with-- who was deposed  
12 and I represented her through a deposition and several  
13 proceedings before Judge Cavanaugh and Judge Falk.

14 I don't recall being subjected to a  
15 confidentiality--

16 THE COURT: And what's the name of your witness?

17 MR. ELBERG: Her name was Barbara Bouchet.

18 At a later point, I also represented briefly  
19 another individual associated with this case. But do not any  
20 longer represent either of those individuals. I am here  
21 purely as a member of the public at this point.

22 THE COURT: Okay. And Ms. Bouchet and who is the  
23 other person that you represented?

24 MR. ELBERG: I briefly represented Kristin Keeffe.

25 THE COURT: Okay. And the litigation issues that

1 each of those witnesses were involved in have been, at least  
2 as I understand, dismissed. Am I correct about that?

3 MR. ELBERG: That's correct, your Honor.

4 THE COURT: Keeffe has no role to play in the  
5 Franco versus NXIVM versus Franco proceedings, correct?

6 MR. MCGUIRE: Keeffe could be -- in event this  
7 matter went to trial, your Honor, I believe Kristin Keeffe  
8 through deposition readings would be a witness.

9 THE COURT: There's a motion to exclude her  
10 testimony?

11 MR. ELBERG: I did not represent Ms. Keeffe in  
12 connection, with anything associated with this case in  
13 connection with another matter.

14 Ms. Bouchet, I did represent in connection with  
15 this matter.

16 THE COURT: I'll take that representation. And who  
17 else? We have a gentleman sitting next to -- or in the  
18 second row?

19 MAGISTRATE WALTER: That's my deputy, Mr. Gorman.

20 THE COURT: His warm gear through me. He just came  
21 from across the street, fine, it looks as if everybody has  
22 either had a role-- or has a role to play, Mr. Sylvester.

23 It looks as if everybody had a role or has a role.  
24 Mr. Sylvester.

25 MR. SYLVESTER: If I might, your Honor. I just



1 wanted to make one clarification for the record. I believe  
2 counsel stated that Ms. Keeffe would be presented at -- if  
3 there were to be a trial. My recollection of the pretrial  
4 proceedings and conference before the magistrate on 15th of  
5 December, was that her name was voluntarily removed from the  
6 list by NXIVM.

7 THE COURT: That's why I was hopeful that Judge  
8 Waldor could rearrange her calendar and she graciously has.  
9 So that when we have procedural pretrial matters raised or  
10 matters raised that are subject to other court orders, she  
11 will be able to confirm one way or the other. And I saw you  
12 nod, Judge Waldor, with respect to Keeffe being no longer  
13 part of this trial.

14 MAGISTRATE WALTER: That's correct, your Honor.

15 MR. MCGUIRE: Your Honor, I am nodding as well.  
16 And I thank Mr. Sylvester for correcting me on that issue.  
17 That was certainly not intentionally misstated.

18 THE COURT: That's fine.

19 That's why we're on the record so we're not having  
20 any kind of mistakes or assumptions and we stay strictly that  
21 way because this case is way too old and way too studded with  
22 orders pinning people down, and I don't want us to forget  
23 what they are and I don't want us to stumble.

24 All right. It seems to me that we start with Mr.  
25 Sylvester's motion for involuntary dismissal based upon what

1 is called in his papers that were filed yesterday-- the  
2 Crockett declaration.

3 If you would come forward to the podium, Mr.  
4 Sylvester.

5 MR. SYLVESTER: Of course, your Honor.

6 MR. MCGUIRE: Your Honor, just so I am clear and so  
7 I could report back to my client. My application to seal the  
8 courtroom is denied. Is that correct?

9 THE COURT: I didn't know that that was where we  
10 were going. Yes. To the extent that you wanted to seal the  
11 courtroom, it's denied.

12 MR. MCGUIRE: Thank you, your Honor.

13 THE COURT: Okay. Mr. Sylvester.

14 MR. SYLVESTER: Thank you, your Honor. One doesn't  
15 need to engage in too much hyperbolae here. I think your  
16 Honor knows the background very, very well.

17 THE COURT: And of course, I read your brief.

18 MR. SYLVESTER: Yes.

19 THE COURT: And, Mr. McGuire, there was no response  
20 on NXIVM's part, correct?

21 MR. MCGUIRE: That's correct, your Honor.

22 MR. SYLVESTER: And, your Honor, I think that's the  
23 starting point. I think the response is essentially my  
24 motion. Because what prompted the motion was something  
25 that's called a declaration and notice of un-readiness.

1 Frankly, I am not familiar with such a pleading, perhaps it's  
2 practiced in California in federal court. I am not aware.

3 THE COURT: Well, let's refer to it as do in the  
4 papers, as the Crockett declaration. Will somebody fill me  
5 in on the docket entry number of that matter?

6 MR. SYLVESTER: Yes, your Honor.

7 COURTROOM DEPUTY: 793.

8 THE COURT: DE 793. I think probably an historic  
9 moment in this courthouse that we are referring-- casually we  
10 are referring to Documentary 793. But we will let that pass.

11 MR. SYLVESTER: I wouldn't let it pass in one  
12 respect, your Honor. I think I am the only one here who's  
13 been around for all 793 files in this case. I have been  
14 around in this matter since August of '03.

15 So our papers, and this motion, is a response to  
16 what we've received.

17 THE COURT: Okay.

18 MR. SYLVESTER: I think, and your Honor is obviously  
19 familiar with the papers. The rule is really a perfect  
20 guidepost for why this case should be dismissed for want of a  
21 prosecution.

22 Now, I was thinking about it this morning. In  
23 addition, there is an estoppel arm which is powerful here. A  
24 15-year old case, papers up to here, I could assure you that  
25 the weekend before the trial would begin, I would be

1 preparing for trial. My family wouldn't know who I was and I  
2 would be, you know, a hermit somewhere.

3 THE COURT: That's called being a trial lawyer.

4 MR. SYLVESTER: It is. This weekend we didn't do  
5 that. My daughter was home and we went out to dinner a couple  
6 of times. I was celebrating my son's birthday. I did not  
7 prepare for this trial. We prepared the motion. The simple  
8 fact is, it was stated to me in no uncertain terms, we are  
9 not trying this case on January 16th. Go fishing. Because  
10 we want to tell you that there is no point in preparing.

11 So that's really the backdrop. So that's really  
12 the motion for all intent and purposes is a response to what  
13 was presented to me.

14 And the cases, I believe, from the Third Circuit  
15 support the position that a plaintiff not willing to go to  
16 trial, and indeed telling your Honor that despite the trial  
17 date, it's not showing up, that that is want of prosecution.

18 Let's think about the 16th of this month. I show  
19 up with my erstwhile colleagues, the brains of the operation,  
20 and the jury--

21 THE COURT: The last time you were here-- that's  
22 out of his mouth, but it's good we have a record.

23 MR. SYLVESTER: That's true. They'll probably  
24 expedite the transcript. But we have everyone here except  
25 the plaintiff. And I dare say I must be a little cynical, if

1 your Honor would permit me to be so. Because I did not  
2 believe that's the sole reason. I put this in my papers,  
3 that Mr. Crockett is not going to come to Newark. There are  
4 a myriad reasons.

5 THE COURT: You know, having read your brief and  
6 the brains of the operation, both sets of brains, anything to  
7 do with the writing, had a very well-written brief.

8 MR. SYLVESTER: Thank you.

9 THE COURT: I think given your history with the  
10 case, and you kept a muzzle on it reasonably well, because  
11 this case has raised all kinds of emotional filings.

12 I don't want to get into punitive motives. I don't  
13 want to get into the history, the recent history and events  
14 of the last couple of months. When we pick a jury, we're  
15 going to make sure that they're thinking about this too.

16 It's just as well keeping that part of it out of my  
17 observations and rulings on this motion. Let's stick to what  
18 the law is.

19 And let me say one of the problems that I have that  
20 I need to you address is, the cases most relied on, three  
21 cases that are on page 8, which kind of form the reassurance  
22 to the Court, hey, Judge, you're not the only one faced with  
23 behavior that is subject to complaining about. These are  
24 either Civil Rights cases. And one of the things, and I say  
25 this as often as I can, one of the secret downfalls of our

1 Civil Rights litigation is that if you took the temperature  
2 of dispositions, which was done way back in 2000, or based  
3 upon the Crocketts in 2000 and 2001, by a law professor,  
4 Jillian Hatfield, and she examined-- the brains of her  
5 operation examined all kinds of filings. And her point was  
6 that this notion that we have that civil cases settle, has  
7 got to be nuanced to accommodate the fortunes of Civil Rights  
8 litigation. And what she discovered was that, yes, the vast  
9 majority of Civil Rights cases are not tried, but that's not  
10 because they're settled. It's because they're dismissed on a  
11 motion to dismiss or on summary judgment. So these are non  
12 trial dispositions. But they're not settlement.

13           So I kind of throw that out for us all to kind of  
14 chew on when we talk about the glory of the, you know, 1983  
15 litigation and everything like that, because it's a rocky,  
16 rocky road that a plaintiff has to traverse.

17           When I see the judges that are dismissing that kind  
18 of a litigation on involuntary grounds, and I know how I  
19 can't say disfavor, but I know how hard the road is for a  
20 plaintiff to travel. I could see the dismissal, involuntary  
21 dismissal being used by the Court, much as dispositive motion  
22 practice is used by the defendants to whittle through a vast  
23 amount of litigation, a substantial percentage of which may  
24 be either frivolous or non meritorious. We use our  
25 procedural tools so that courts are available for what are

1 considered to be the substantive cases.

2           So that's -- I have been as long winded as I can  
3 be. But I think we have to be nuanced about this whole thing  
4 and say, what authority is there, when essentially a litigant  
5 is putting its thumb in the Court's eye and saying, you  
6 didn't want to give me an adjournment because my lawyer can't  
7 travel. All I'm asking for is a couple of weeks and you  
8 wouldn't do it, so I'm not going to show up. All right.  
9 That's what I am doing. And I am stamping my foot and  
10 saying, you know what, I am not going to show up when you  
11 told me too and there's nothing you can do.

12           So that's what I see the Crockett declaration  
13 saying to the Court. And my response back will be colored by  
14 your arguments. But understand, you have a lot of other  
15 quivers in your bow or arrows in your quiver, or whatever  
16 they are. I am not Robin Hood. And you can, you know, hit me  
17 with your best shot perhaps down the line as opposed to both  
18 of us walk right into -- we get right on the edge of the  
19 diving boards and do our double flip and there's no water in  
20 the pool according to the circuit.

21           MR. SYLVESTER: If I might, your Honor, maybe let  
22 me put some water in the pool then. I am not interested in  
23 talking about the events of the last few months. Because it  
24 doesn't matter to me, and I believe it wouldn't matter to the  
25 Court, if the events of the last couple of months, or if the

1 necessary witness just hit the lottery and won 400 million  
2 and now owns a country of her own, is just not showing up.

3 My point is that in addition to the Crockett  
4 declaration, where Mr. Crockett is saying, I can't get there,  
5 putting aside whatever your Honor's viewpoint is. I share  
6 your viewpoint with regards to the Crockett firm which has  
7 been in the case forever. But putting that aside, there's a  
8 very important second component which I am trying to flesh  
9 out with my esteemed adversaries, and that is, is Ms. Salzman  
10 coming to the trial or not?

11 THE COURT: Why don't we ask Mr. McGuire who  
12 represents her as to whether she's showing up. And also to  
13 represent, because it would be helpful for the Daubert piece  
14 of this in terms of an assessing it, what are these other  
15 witnesses that don't appear in the pretrial order that are  
16 going to testify as to damages? Maybe Salzman is one of  
17 them.

18 Mr. McGuire, is she showing up for trial?

19 MR. MCGUIRE: I'm going to give you an answer that  
20 I am very, very hesitant to give which is, I don't know.

21 THE COURT: Can you help us out -- now, let me make  
22 sure that you're answering the question because I didn't  
23 phrase it well.

24 Is she coming to trial ever? Is she going to show  
25 up ever? No matter when we try this case, is she going to



1 show up? I'm not talking about Crockett being here or not.

2 Let's hypothesis Crockett's here. Is she going to show up?

3 MR. MCGUIRE: I think this is what is called-- what  
4 people call being put on the spot.

5 THE COURT: I am doing it to you. Right.

6 MR. MCGUIRE: I do not have an answer, your Honor.

7 THE COURT: And my second issue is--

8 MR. MCGUIRE: If I may be heard.

9 THE COURT: On the damages. If she showed, would  
10 she be testifying to damages? And is that what Mr. Crockett  
11 meant when he said, I have other witnesses to testify as to  
12 damages?

13 MR. MCGUIRE: That I can answer. I have fleshed  
14 that specific question out with Mr. Crockett. What I was  
15 trying to rudely interrupt the Court before about, was my  
16 answer is not due to lack of due diligence. However, there's  
17 been a break down in communications, I don't want to either  
18 violate attorney-client privilege or bore the Court with the  
19 particulars of the client relationship.

20 THE COURT: Would Mr. Crockett be in possession of  
21 that information as to whether Nancy Salzman intends to come  
22 and prosecute her case in person?

23 MR. MCGUIRE: As of last night, I do not believe  
24 so. There are moving pieces in play that I am happy to speak  
25 to the Court off the record about. But I'm not at liberty to

1 speak about openly.

2 THE COURT: Fair enough. Thank you.

3 MR. MCGUIRE: In fairness, I have to say some of  
4 these issues that I'm referring to by innuendo too with Mr.  
5 Sylvester.

6 THE COURT: I'm not going to probe that because I  
7 don't want to have discussions off the record. Use it in  
8 your argument without divulging it.

9 MR. SYLVESTER: True. And I don't intend to  
10 discuss it at all about the off-the-record comments. But my  
11 point to this Court is, I first came to this courthouse 34  
12 years ago. My first federal court appearance before Judge  
13 Sarokin Albester (ph) and I've been coming here forever.

14 THE COURT: They were in this courtroom.

15 MR. SYLVESTER: It was. I was sitting right there  
16 and Mr. Albester was sitting right here (indicating).

17 THE COURT: We have a little plaque right in the  
18 back of the chair that you sat in.

19 MR. SYLVESTER: I'll take the chair with me when I  
20 retire. My point is, my representations to the Court, I have  
21 a good-faith basis to asking this with regard to the actual  
22 party that would be here. And as far as I know, given  
23 multiple requests for a confirmation of same, there's been no  
24 confirmation that the actual party will be in this  
25 courtroom.

1           THE COURT: I think we might be able to deal with  
2 that by requiring -- let's put it this way. Everybody should  
3 know that I intend to give both sides the jury trial that  
4 their complaint and counterclaim asks for.

5           If the matter is not resolved either by way of  
6 pretrial motions or stipulations by counsel, there will come  
7 a day where members of the public will drive to Newark, a lot  
8 of them very unhappy, and we will start the process of jury  
9 selection.

10          If at that time, a necessary party, according to  
11 your feelings about it isn't here, prepared to prosecute the  
12 case, and there's a representation by counsel, no, they are  
13 not going to show up, then the costs of getting that jury  
14 here and your costs of preparing the case are certainly  
15 something that can be presented to the Court.

16          So you do have remedies, in terms of our not being  
17 sure. And I think probably, given the history of the case  
18 and the warble board we are all on, what's going to happen  
19 next, it's probably best to use these tools for discernment  
20 by just firm dates, jurors in the jury room, prepared to come  
21 in here for jury selection. Where's the plaintiff? Not  
22 here. Then you start talking about what you're talking about  
23 now.

24          MR. SYLVESTER: Your Honor, I am hopeful that some  
25 of the other arrows in my quiver will avoid that necessity.

1 But I do want to address one issue with regard to  
2 whether or not there will be another witness on damages.

3 THE COURT: Meaning Salzman?

4 MR. SYLVESTER: That's correct.

5 THE COURT: Okay.

6 MR. SYLVESTER: There cannot be a presentation on  
7 damages in this case, even if she shows up.

8 If I could hand up to your Honor, I have their  
9 trial exhibit list. There are only six items on the trial  
10 list. None of them relate to damages. And, in fact, this is  
11 going to be the subject of an argument with regard to the  
12 Daubert, because Mr. Smith has no record by which to opine on  
13 anything, because no damage information has been produced in  
14 this case and he certainly can't be both the source of the  
15 information and the arbiter of the information. The  
16 information has to come from the client and that has never  
17 happened in this case. And the trial exhibit list-- it's  
18 clear that those proofs are never going to be before your  
19 Honor.

20 THE COURT: What's on the trial list?

21 MR. SYLVESTER: Can I hand it up to your Honor?

22 THE COURT: Put it on the record.

23 MR. SYLVESTER: There are as of December 15, with  
24 the conference with Magistrate Waldor, plaintiff's reduced  
25 their trial exhibit list to the following.

1           The May 5, 2001, executives success programs  
2 student enrollment, signed by Ms. Franco.

3           Secondly, they're going to introduce the June 27,  
4 2001 executive success program enrollment signed by Ms.  
5 Franco.

6           They're going to introduce as a third exhibit, the  
7 NXIVM course manual which is in a binder that Ms. Franco  
8 purchased when she went to it intensive, and had it in her  
9 home subsequent.

10           They are going to introduce what they've identify  
11 as Ms. Franco's August 28, 2001 certification.

12           And lastly, they say that they are going to  
13 introduce the intellectual property definitions and  
14 protection programs of two different training businesses.  
15 Which I don't think, by the way, is admissible for a lot of  
16 reasons. But that's the sum and substance of the entire  
17 list. There's no financial information. There's no tax  
18 returns. There's no financial data. There's no audit or  
19 unaudited materials.

20           So as we sit here, even if Ms. Salzman comes and  
21 she's given all of the exhibits, which we are now called on  
22 the exhibits list, there's no damage case to be put on  
23 through her.

24           THE COURT: Okay.

25           MR. SYLVESTER: That's why frankly -- to digress

1 for a moment since I am making a point. Your order yesterday  
2 said necessary for witnesses--

3 THE COURT: For today.

4 MR. SYLVESTER: It's plural. I think appropriately  
5 so. Because Mr. Smith really can't get on the witness stand,  
6 in my view, until there is some sort of a record by which he  
7 can start making his opinions known to the Court.

8 And the way I would read this frankly, I would say,  
9 I'd better get my client here, and run and get her here to  
10 put the financial information in the record, despite the fact  
11 that we know that Ms. Franco's counsel is going to argue, it  
12 was never in the Rule 26 disclosures. It was never produced  
13 in discovery. It was first seen by me after close of  
14 discovery in the context of this report in February of last  
15 year.

16 So, I never had an opportunity to examine any  
17 witnesses on this. In fact, when I did examine the 30(b)(6)  
18 witnesses, they said on question of damages, the entire  
19 universe of our damages are contained in Exhibits A, B and C  
20 to the amended complaint. And when she was asked, she said,  
21 that is all of it.

22 So the first step, and since Mr. Smith doesn't  
23 address A, B and C at all. In fact, he says I can't do  
24 anything with A, B and C being impossible to make any link.  
25 There is a complete disconnect. And this is why I am arguing

1 ahead. But everything is sort of a ball here, if you will,  
2 your Honor.

3           Mr. Smith does not fit this case. Because he has,  
4 for all intent and purposes, rejected the damage theory that  
5 the plaintiff has posited for 15 years and said it doesn't  
6 work. I can't do it. It's an impossibility. So I got my  
7 own. The problem is he can't do his own. There has to be  
8 some record. I was entitled, if they were going to use  
9 financial statements, to examine a witness for a lot of  
10 reasons, if we go forth with the Daubert hearing, and I am  
11 unsuccessful on my procedural motion, you're going to want an  
12 understanding of why I wanted an opportunity to interact with  
13 their witnesses at deposition, we wouldn't even be here. As  
14 simple as that. I say that with no false bravado. I just  
15 think it's a reality.

16           So we are really at a very important point that I  
17 read this necessary witnesses must appear to be very  
18 important. Because the first witness has to be the client,  
19 getting on the stand over my objection about prejudice and  
20 undue surprise and Rule 26 problems. And the fact that they  
21 blew the discovery deadline, still take their shot in getting  
22 the financial information before your Honor. This is not  
23 happening. She's not here.

24           I make a representation to the Court, Ms. Salzman  
25 and no one on behalf of NXIVM is in this court.

1           THE COURT: Well, give me a kind of a -- not really  
2 an offer of proof, but give me the equivalent of an offer of  
3 proof as to what you think will happen if Mr. Smith testifies  
4 and you zero right in on the fact that he's opining over a  
5 chasm insofar as there's no financial information from which  
6 he can extrapolate his damage theory.

7           MR. SYLVESTER: Gladly, your Honor. Yes. I will  
8 make the following offer. I believe the testimony would  
9 establish that Mr. Smith never spoke to the client directly.  
10 Never spoke to the accountant directly. And completely was  
11 spoon fed information from the Latham Watkins firm through  
12 Mr. Crockett. Did no independent verification. The exact  
13 things he was called out by in the Southern District of New  
14 York judges for having unreliable information.

15           And the importance of that is, he says in his  
16 report, I cannot vouch for the professionalism and accuracy  
17 of a CPA who I am told did these financials.

18           So he can't vouch for the accuracy. He has never  
19 spoken to the accountant.

20           And what I will present, as well, is a letter from  
21 the accountant, during that window period that he claims is  
22 his damages, in which the accountant's letter says, I can't  
23 vouch for accuracy of my client's information; this is a  
24 compilation; this isn't an audit. This is a compilation. I  
25 took their numbers and they didn't make disclosures to me. I



1 didn't go into their books and records. I just took whatever  
2 they gave me and put it in some form so it looks like  
3 something.

4           So let's think about what that means. My offer of  
5 proof for your Honor is that this expert is going to say, I  
6 can't vouch for the CPA and I never did anything to  
7 independently verify the number. And the CPA is going to say  
8 the same thing. I can't vouch for the information and I  
9 can't independently verify the numbers.

10           So how on earth do we get to a point where your  
11 Honor could find that the important critical information upon  
12 which he opines is reliable in any way, shape or form?  
13 Everyone is saying this is unreliable.

14           THE COURT: Or it's unverified.

15           MR. SYLVESTER: Unverified. And there's no witness  
16 here to say, as you point out, the chasm, we will fill that  
17 hole by saying this is reliable. So there's no accountant in  
18 the room.

19           And by the way, if he got on the stand, he would  
20 say, I didn't verify it. This is a pure compilation and uses  
21 the words in his letter which, your Honor, would say, I make  
22 no assurances about the accuracy. So that's the level of  
23 reliability of this information.

24           THE COURT: I'm going to stop you. I get it. In  
25 arguing what I would hear if I had a Daubert hearing, I am

1 all the more satisfied that we should have a Daubert  
2 hearing. Because to the extent that accusations and concerns  
3 that you've raised about the good faith of the plaintiff, are  
4 in fact going to play any role at all in rulings in your  
5 favor. I think that the circuit deserves a full record from  
6 which it can make just, you know, transparency, why did the  
7 judge rule against NXIVM? If that is what you think I should  
8 be doing. Well, because X, Y and Z happened and there was a  
9 hearing.

10 When we have all of the players and we have good  
11 briefing on the issues and we have an expert report and  
12 somebody here prepared to defend it, and lawyers who are  
13 well-versed in the case, boom, let's do it. We are here.  
14 Okay.

15 MR. SYLVESTER: Your Honor, I don't disagree, your  
16 Honor. We are prepared and we're going to hand up the  
17 exhibit books. And I think that your Honor would find that  
18 the qualifications are want, and you will find unreliable  
19 information. And you will also find that he doesn't fit  
20 their entire theory of the case going back to '03. But I  
21 would remark, if I might, there is this chasm, it is the  
22 Emperor's New Clothes. He can't be the source, conduit and  
23 arbiter of your information, because the simple fact is if I  
24 were to put myself in your Honor's robe for a moment, okay,  
25 say, counsel, where was this financial information ever put

1 into the record of this case? This gentleman is opining on a  
2 vast array of financial information, which just doesn't  
3 exist.

4 THE COURT: Let's see how he handles it. I am  
5 taking everything that you're saying, but I prefer to hear  
6 those arguments after I see whatever effort is made.

7 MR. SYLVESTER: True enough.

8 THE COURT: It could be far more wins than you're  
9 telling me.

10 MR. SYLVESTER: I did get ahead of myself. This is  
11 a Rule 41 motion. And I getting back to the Rule 41.

12 THE COURT: Right.

13 MR. SYLVESTER: Again, I think what's been made  
14 very clear here is my Rule 41 isn't the impetus for us being  
15 here and arguing. It's just a reaction of which-- what is  
16 reality.

17 I must point out also -- that this is a backdrop  
18 that your Honor might want to consider. Is how many times  
19 for putting aside 793, or how many times you get to that  
20 number, how many times with respect to parties have you  
21 granted two Rule 41 motions? Because you already granted a  
22 motion under Rule 41. So I think that is important for your  
23 Honor to recognize.

24 Because in the other case there was a state court  
25 case that started in Niagara County for whatever reason.

1 Obviously, it was the most inconvenient place in the world  
2 for my client to have to defend a case. It was removed to the  
3 Western District of New York, transferred down here. My  
4 clients, with all due respect to counsel, were never served.

5           And by the way, I want to make a point, the  
6 Tompkins firm and Mr. McGuire never appeared in that case at  
7 all. But it wasn't prosecuted in any way, shape or form and  
8 it was just there. And I am not getting into the  
9 machinations of why it may have occurred, nor the motivation,  
10 nor the litigation strategy that has been spoken about with  
11 regard to NXIVM over the years. But the simple fact is, we  
12 had to use Rule 41 to get rid of that. And we are back with  
13 Rule 41. And I must say, that given the fact that we have an  
14 absolute representation that they're not starting-- and I'm  
15 not so sure this is a thumb in the eye. But it's your eye,  
16 so you have to be the judge of that.

17           I look at it more, with all due respect to my  
18 esteemed counsel in California, as a lawyer trying to protect  
19 his client-- perhaps. And I think on the 16th that door will  
20 not swing open and Ms. Salzman will not walk in. But in the  
21 meantime, what are we doing? This is costing a fortune.

22           THE COURT: I understand. What we are doing is  
23 doing--

24           MR. SYLVESTER: That's a rhetorical question.

25           THE COURT: I know. We have to be clear. We are

1 marching along because people have filed a complaint and  
2 counterclaim and they have asked for a jury trial. I am  
3 sitting here doing my thing, you know, the baseball game was  
4 scheduled and the ump showed up, maybe none of the team may  
5 not be on the bus, but the ump is here and we have the  
6 jurors.

7           So I believe that we're establishing a record in  
8 good faith reliance on the way things work is a fairer way to  
9 go for both sides. Is it more expensive? Yes. But so much  
10 blood and money has been spilled so far. Let's see if we  
11 could spill some blood and money and get results.

12           MR. SYLVESTER: Your Honor, in that latter regard,  
13 I want to remark on one thing you said and that is, there's a  
14 complaint counterclaim jury demand and such.

15           With the permission and authority of my client, I  
16 will tell this Court that if the claim against Ms. Franco is  
17 dismissed, she will, and this is with again, we firmly  
18 believe that we could establish the proofs. She doesn't want  
19 any more of this. She is happy, believe me, to just say, you  
20 know, let me just not show up in court and I don't need that  
21 counterclaim in my life.

22           This isn't necessarily a legal argument, but this  
23 is the truth. I want your Honor to understand that we are  
24 not going to march and try a counterclaim without a main  
25 claim. And I have an affidavit from the client that I could

1 present up whenever your Honor wants. She would be happy to  
2 get on the phone with your Honor. We would want, of course,  
3 sort of without prejudice if anything ever shows up again, I  
4 guess we will pursue.

5 But if the main claims goes, that door couldn't hit  
6 me in the you know what fast enough. And I will not be here  
7 on the 16th. I can assure you.

8 THE COURT: Okay. Thank you. Mr. McGuire.

9 MR. MCGUIRE: I will be brief, your Honor. And  
10 I'll try to limit myself to the Rule 41 issue.

11 THE COURT: And you don't have to say too much. I  
12 pretty well made myself clear. That my feeling may well be  
13 as meritorious as these motions get. And in fact, the rule  
14 has been employed in the case historically. But having all  
15 the players in front of me, and a good-faith position taken  
16 in the papers on the Daubert hearing portion of this, and  
17 however the Rule 26 issue plays a role that to me get folded  
18 into the Daubert rulings, I am not prepared at this point to  
19 grant the 41(b). So that's how brief you could be.

20 Thank you.

21 MR. MCGUIRE: I would like to, your Honor. Number  
22 one, I don't think I can respond to the Rule 41 application  
23 since it was via a mechanism of the Crockett declaration.

24 THE COURT: You don't have to respond. I just said  
25 it's denied.

1           MR. MCGUIRE: One thing I would like to respond to  
2 though with respect would be any inference that the Court may  
3 draw that the Crockett declaration was a thumb in the Court's  
4 eye-- that was not the motivation.

5           THE COURT: It's very hard to avoid a link up  
6 between the two requests for a delay of the trial that were  
7 denied and the client's position that without Mr. Crockett,  
8 we're not showing up. Because the impetus for the client's  
9 position, without Mr. Crockett, we are not showing up, is the  
10 Court's denial of a request for an adjournment.

11           So that's where I am coming from, and I think I am  
12 entitled to put that on the record. It's not the clients. I  
13 am really saying something in your client's favor. It's not  
14 the clients saying, I am stamping my foot, I won't hold it  
15 up. It's the client saying, you pierced my heart and I won't  
16 show up because I have a right to counsel of my choice. And  
17 in defending that position, or presenting that position,  
18 albeit obliquely, Mr. Crockett has torn the veil off a  
19 position that he held earlier in this case, which is he was  
20 Keeffe's lawyer. He had nothing to do with what was going  
21 on.

22           So faced with protecting the client now, or setting  
23 up the client the way the client wants to be setup, which is  
24 with him by its side, he has had to reverse course. This was  
25 all hashed out, I believe, before Judge Waldor at the pro hoc

1 vice argument.

2 Am I right about that, Mr. Sylvester? Wasn't that  
3 the point that was being made?

4 MR. SYLVESTER: In great detail. Your Honor.

5 THE COURT: Yes. So if Mr. Crockett feels that  
6 intensely that he's got to look like he comes from both sides  
7 before the Court as an officer of the court because the  
8 client feels that strongly, and I am the one who said, we are  
9 going forward on the 16th, what else can I think, other than  
10 that this is an adept way of saying, you deny my jury  
11 request, I ain't showing up.

12 I could grant the 41(b) on those grounds, I could  
13 prevail when? Not if it's appealed. But I am not going to  
14 walk into that. I have other things to consider. Because if  
15 in fact I am reversed, we're going to be that much older and  
16 that much grayer and then we'll be doing the Daubert  
17 hearing. So let's get it done now. Okay? You made your  
18 record.

19 Let's get the Daubert hearing under way.

20 MR. MCGUIRE: Thank you.

21 MR. SYLVESTER: Your Honor, do you want to hear the  
22 Rule 26?

23 THE COURT: Quickly. Yes.

24 MR. SYLVESTER: I will very be quick. The Rule 26  
25 motion really starts and ends with what I mentioned before,



1 that is, from day-one there was a damage theory which was  
2 presented and it was all about exhibits A, B and C in the  
3 complaint.

4 THE COURT: Again, the record is empty on the A, B  
5 and C. Give us briefly A, B and C.

6 MR. SYLVESTER: Exhibit A was a list of individuals  
7 who stopped attending classes, purportedly as a result of  
8 something Ms. Franco did.

9 THE COURT: Now, just how that list was compiled.  
10 Was there any information that was a matter of record or that  
11 came up in the course of discovery as to where these people  
12 came from?

13 MR. SYLVESTER: Let me just say, Exhibit B was a  
14 list of people who decided not to go. And Exhibit C were a  
15 list of individuals who stopped having any services provided  
16 to NXIVM vendors, if you will.

17 THE COURT: So presumably NXIVM could take the  
18 position, these are the costs or fees would have been paid to  
19 us, we add them up and that is our-- complaint.

20 MR. SYLVESTER: They did that. What was done and  
21 it's interesting, because the complaint was filed and there  
22 was not upon information and belief. It was definitive.  
23 That these are the people. As if they did what Mr. Smith  
24 said was impossible, and that is just talk to people and were  
25 able to compile a list of those who ran from the

1 organization, what they claim as a direct result of something  
2 that Ms. Franco did. And were fervent about that, and  
3 continued to be fervent throughout the Rule 26 disclosures  
4 saying, Exhibits A, B and C. By the way, there's at least  
5 three disagreements before the Court over whether they should  
6 remained sealed. And they have been. So they have been  
7 sealed and they have been protected and proprietary. The  
8 30(b)(6) witness in this case testified that A, B and C were  
9 the-- all of its entire universe of damages.

10 THE COURT: And that's Ms. Salzman.

11 MR. SYLVESTER: Ms. Salzman.

12 Kristin Keeffe, who acted as legal liaison,  
13 whatever title that necessarily connotes for the  
14 organization, nonetheless had information about Exhibits A, B  
15 and C, and she asserted to this Court that damages would be  
16 easy to prove as a result of what they believed to be these  
17 individuals who discontinued their association.

18 And they actually went through the math. You know,  
19 in my view, whether a scheme or not, they went through the  
20 math, and said, this person would have brought this much in  
21 and then we'd have these others. Here's how much we lost on  
22 every person is on the exhibits.

23 This was the entire framework for the damages case  
24 for the entirety of this case. The discovery ends. That's  
25 it. That is what the damages are.

1           Now what I may have done independently to call  
2 someone on the list was to find out that it was a lot of  
3 mularky. That's my business. But I thought -- again, to use  
4 a legal phrase, a lot of mularky, frankly.

5           But the documents that were presented supported my  
6 proposition, because there was nothing presented on Exhibits  
7 A, B and C.

8           So it's very easy. So this is where Mr. Smith, I  
9 don't understand, just called the people up, send them a  
10 questionnaire, which was very easy. But they were fervent  
11 and they did not follow that pleading on information and  
12 belief, under penalty of Rule 11, they asserted without  
13 question, that these are the people that ran from us because  
14 of you. This is our damages theory.

15           I've defended this case for a decade or more on the  
16 basis of this: Only on February of last year to get  
17 something that takes Exhibits A, B and C and throws in the  
18 garage. No amendment of Rule 26. No modification. So I  
19 guess, I suppose I should say, you know, Rule 26 doesn't  
20 cover this situation. Then what could it conceivably cover  
21 in terms of prohibiting and changing course at the last  
22 minute? At what point is it that I've wasted ten years and  
23 umpteen, umpteen thousands and thousands of dollars, plus  
24 going through all depositions and investigating a rock solid  
25 damages theory that they were so cock sure about? I spent a

1 lifetime, if you will. My son was three when I started this  
2 case. I celebrated his 18th birthday on Sunday. It's  
3 absurd. But I spent the lion's share of that time, up until  
4 February last year, battling Exhibits A, B and C, all the way  
5 down the line.

6 Now that I'm at eve of trial where there is nothing  
7 to support Exhibits A, B and C, they say, well, never mind,  
8 let me give this a shot.

9 THE COURT: Remind me of something.

10 MR. SYLVESTER: Sure.

11 THE COURT: We had several rounds of summary  
12 judgment motions. And this is the one claim of NXIVM that  
13 was preserved, correct?

14 MR. SYLVESTER: That is correct.

15 THE COURT: And again, I have to rely upon, even  
16 though I was the one that made this decision. Did the  
17 decision rest upon the theory that you were battling against  
18 that NXIVM had suffered losses and therefore it has something  
19 to say. In other words, there wasn't a failure of a-- there  
20 wasn't a summary judgment to be had because of the failure of  
21 a damage theory? Or put another way.

22 MR. SYLVESTER: I understand.

23 THE COURT: Yes.

24 MR. SYLVESTER: Your Honor, after 34 years, which  
25 that modifies, pushes a thumb sort of towards your eye a

1 smidgen, and into the court, I suppose.

2           You had the second round of summary judgment  
3 motions on Count I. We made the point that there is no  
4 damage. There's nothing. And the Court shouldn't concern  
5 itself with a trifle. What are we doing here in a sense  
6 that's there's no damage? I'll give you everything that they  
7 said and there isn't anything.

8           So there's no claim because of a necessary prong.  
9 But you had a second time around.

10           Judge Cavanaugh decided it the first time around.  
11 And he just found that there was a fact issue on damages in  
12 the context of what he had before him. And you agreed with  
13 that.

14           THE COURT: All right. So at that time he had  
15 before him the now Court's abandoned A, B, and C structure?

16           MR. SYLVESTER: He also had a certification of Mr.  
17 Smith, a declaration, which, with all due respect to the  
18 Court, I don't think got him over the hump. Because when I  
19 saw that I said I won, pure and simple. Because all Mr.  
20 Smith spoke about in his declaration, was gross revenues,  
21 which is not a cognizable element of damage in a breach  
22 contract case. It all comes down to lost net profits.

23           Revenues, could you make one billion dollars. But  
24 if costs all revenue, you have no damage. In fact, I did you  
25 a favor. You lost less money.

1           So I thought when I saw that certification that it  
2 wasn't a retreating from Exhibits A, B and C, because he  
3 wasn't clear that he was calling all of these people and  
4 raised proofs. Even though I didn't think there was any.  
5 But his theory just didn't line up with what was permissible  
6 under the law.

7           So in my view, with all due respect to the Court on  
8 summary judgment, that there was no fact issue because A, B  
9 and C wasn't presented. And, there was no affidavits and no  
10 non hearsay evidence before the Court to permit introduction  
11 of any damage theory. And Mr. Smith was a throwaway. He  
12 helped me. Pennies from heavy, if you will. The fact that  
13 he was off on a dalliance on lost revenue.

14           THE COURT: We're going off.

15           MR. SYLVESTER: We are.

16           THE COURT: Before Judge Cavanaugh, there was a  
17 dispute damages provable or proven, or asserted, or revealed,  
18 and he said that there was a fact issue.

19           MR. SYLVESTER: True.

20           THE COURT: And then my summary judgment motion,  
21 basically said Judge Cavanaugh said there was a fact issue,  
22 and here we go.

23           MR. SYLVESTER: That's correct. I do have a  
24 wrinkle to it, your Honor, if you don't mind.

25           THE COURT: This case has nothing about wrinkles.

1 We've all gotten wrinkled while the case has been going on.

2 But go ahead.

3 MR. SYLVESTER: My earnest colleagues, this may  
4 actually be the winning argument as they see it. No matter  
5 how you slice it now, there isn't any way that plaintiff can  
6 sustain its burden to show there's damages that exceed \$75  
7 thousand dollars. That's the truth. No way. No how. And  
8 the Court must always -- I remember Judge Greenberg in the  
9 Third Circuit starting right out saying, we always have to  
10 search the record for jurisdiction to be able to show that  
11 you have a right to be here.

12 THE COURT: I have to share a Judge Greenberg's  
13 story. He pulled that and he means it. That's the beginning  
14 of a moot court argument at my alma mate, Seton Hall Law  
15 School. You had these innocent shaking third year law  
16 students about to open their mouths and Judge Greenberg  
17 explained how there was no jurisdiction at federal court  
18 based upon the problem. There was like silence in the  
19 courtroom. And then Judge Barry, just put her hand on his  
20 and said, Morty, don't do that. But he's right. So we could  
21 be on as we have been a couple of days on the eyes here. But  
22 what I'm going to do--

23 MR. SYLVESTER: May I say one thing? Since we're  
24 telling Judge Greenberg stories. It was in this august room  
25 down in the Third Circuit. I had an answer because Justice

1 Scriber (ph) had warned me. He said, Tony, you have to  
2 always remember jurisdiction. I had actually an answer.

3 But the answer for the Court on that is, it's just  
4 another -- you know what, it's another quiver in your  
5 supposed arrow or bullet in your holster. Because if I had  
6 Judge Greenberg on appeal--

7 THE COURT: The bullet is not in the holster. The  
8 bullet is in the gun.

9 MR. SYLVESTER: In a gun. I am mixing it up.  
10 Anyway, that's my argument on Rule 26. I am prepared to  
11 argue the motion to strike the expert. But if your Honor  
12 wants to dispense and go to Daubert, that's fine too.

13 THE COURT: You raised a host of issues that would  
14 suggest that if you are successful on even a fraction of  
15 them, Mr. Smith will not be testifying and then we move to  
16 whether or not there's such a hole that the plaintiff doesn't  
17 go forward.

18 But again, having that many arguments, having Mr.  
19 Smith cooling his heels, waiting to testify, recognizing we  
20 are all here together, I believe that's a better record to  
21 present to the Third Circuit-- is that we go forward with the  
22 hearing.

23 MR. SYLVESTER: Yes. For what it's worth, your  
24 Honor, I actually agree with that, and I'm looking forward to  
25 going forward.



1 THE COURT: Let's take a break and then you will  
2 present your witness. And we'll go from there.

3 Off the record.

4 MR. MCGUIRE: Thank you.

5 (RECESS TAKEN).

6 THE COURT: Good afternoon. We'll do the direct of  
7 Mr. Smith and do the cross and then break for lunch.

8 We'll bring Mr. Smith up.

9 MR. MCGUIRE: Mr. McGuire.

10 Your Honor, I'm going to be working off two  
11 documents-- or however the Court wishes to proceed.

12 THE COURT: Right. And the direct, as I understand  
13 it is, that you will basically be giving Mr. Smith's  
14 qualifications through his testimony and then just background  
15 for preparation of his report and relied on-- is that what  
16 we're talking about pretty much?

17 MR. MCGUIRE: As well as his conclusions.

18 THE COURT: Fine.

19 MR. MCGUIRE: If the Court wishes to address his  
20 qualifications first, then hand it off to Mr. Sylvester.

21 THE COURT: Let's put on what you want to put on  
22 and then we'll see where we're at approximately five after  
23 one. Okay?

24 MR. MCGUIRE: Okay. Smith-1 will be Mr. Smith's  
25 report and Smith-2 will be his 2017 declaration.

1           MR. SYLVESTER: If I may, your Honor. With regard  
2 to documents that are going to will be marked. I think I've  
3 already foreshadowed my objection. Because again, there is  
4 simply no foundation in the record for specific information  
5 in those reports. It's sui generous. It's just there  
6 because he wrote them there. There's nothing I could point  
7 to in the record which is -- I don't know. 75 boxes in my  
8 office that includes this information. So an expert can't  
9 stand alone. I am entitled, with all due respect to counsel,  
10 to have an expert who draws conclusions from the facts of the  
11 case. The evidence in the case. Nothing in this report, as  
12 it relates to financial data is in the case.

13           THE COURT: All right. I'm going to permit Mr.  
14 McGuire to use the documents with respect to the foundational  
15 questioning that he wants to put forward.

16           To the extent that Mr. Smith has written a report,  
17 or has put in his declaration -- you know what? Let me stop  
18 right there. We've got to qualify him. Let's qualify him  
19 first.

20           MR. SYLVESTER: Thank you.

21           MS. GARCIA: Would you stand and raise your right  
22 hand, please.

23

24

25

1 ^^ DON SMITH, the witness herein, having been first duly  
2 sworn by the Courtroom Deputy, was examined and testified as  
3 follows:

4 MS. GARCIA: State your full name and spell your  
5 last name for the record please.

6 THE WITNESS: My name is Don Smith. First name  
7 D O N, middle initial E for Elsworth  
8 E-L-S-W-O-R-T-H. Last name Smith S-M-I-T-H.

9 THE COURT: Thank you, Mr. Smith.  
10 Your witness.

11 MR. MCGUIRE: Thank your, your Honor.

12 ^^ DIRECT EXAMINATION

13 BY MR. MCGUIRE:

14 Q. Mr. Smith, thank you for being here today. Where do you  
15 live, sir?

16 A. What?

17 Q. Where do you live?

18 A. I live in Ithaca, New York.

19 Q. Address?

20 A. 1329 T-A-U-G-H-A-N-N-O-C-K Boulevard, Ithaca, New York.

21 Q. Mr. Smith, I would ask that you begin your testimony  
22 today by sharing with the Court your formal educational  
23 background.

24 A. Yes. In summary, I have a BS, Bachelor of Science car  
25 Degree in Mechanical Engineering from Carnegie Mellon

1 University 1965. I have a Masters in Business with  
2 specialization in marketing from the University of Pittsburg  
3 1966.

4 Q. Mr. Smith, is it fair to say that after you've received  
5 your MBA from Pittsburg and that you went into the work  
6 force?

7 A. Yes.

8 Q. Could you please provide the Court with a chronological  
9 summary of your work experience, let's say from 1966 moving  
10 forward?

11 A. Yes. Concisely I had a career with a Fortune One  
12 Thousand Companies and privately held companies from 1967 to  
13 1989. And I began a full-time independent consultant,  
14 primarily focused upon new products. In relation to my  
15 preconsulting career, I was in middle senior management  
16 Fortune One Thousand in family owned companies.

17 The first job I held was a market analysis for  
18 Johnson Control. They do environmental control systems,  
19 commercial industrial buildings. My responsibilities there  
20 included primarily business analysis, forecasting, sales  
21 analysis, intellectual property. And if I didn't mention new  
22 products, a lot of time in new products programs. And I  
23 spent five years there.

24 I went down the street. This is in Milwaukee  
25 Wisconsin to a company by the name of Johnson Control. I'm

1 sorry. Coca Cola. Coca Cola had a business unit that  
2 handled commercial and residential boilers and other heating  
3 systems. My responsibility there was the manager of market  
4 research and new product planning. Our responsibilities  
5 there again included business analysis, new products and  
6 forecasting and intellectual property and I had some line  
7 management responsibility for some small business units and I  
8 was there for seven years in Milwaukee.

9 I moved from there to Baltimore, Maryland and I  
10 became the director of marketing and sales. My first  
11 responsibility, profits and loss responsibilities because I  
12 had responsibility for three business units and primarily  
13 filtration related issues. Primarily commercial, industrial,  
14 some residential. That gave me profits and loss  
15 responsibilities. I had direct responsibility for entire  
16 sales force, domestic and international. I had direct  
17 responsibility for marketing, and all other as specifics.

18 This is just as a brief explanation. A lot of  
19 people think that marketing is advertising. That's one small  
20 portion of marketing. Marketing concisely includes the  
21 products, the existing and new products. It includes the  
22 pricing of new products and all commissions and discounts and  
23 terms and condition related that deals with promotion and  
24 advertising and publicity. It also deals with sales  
25 channels, and selling direct or indirect or international

1 etc.

2 It also includes intellectual property. It also  
3 all for forecasting and all business planning and sales  
4 analysis, competitive intelligence, a whole range of  
5 activities. It's simply more than advertising. Of course, I  
6 did all of those things when I was with the systems group.  
7 They sold that business and I was there for nine years.

8 I then moved, relocated to Elmira, New York. I'm  
9 sorry. A particular company located in E-L-M-I-R-A. That  
10 was a privately held business, about 13 million dollars in  
11 sales at that time. And my responsibilities there were  
12 director of marketing and sales. Again, I had full products  
13 line responsibility, responsible for all sales and all of the  
14 marketing and all the IP, business case analysis and new  
15 products, and all the others. And I was there for about  
16 three years.

17 THE COURT: You may have told me, but I missed  
18 it.. What did that business do, the particular Elmira  
19 business.

20 THE WITNESS: I'm sorry. The Elmira business had  
21 two primary business units. One was filtration primarily  
22 focused in oil filtration on the industrial side.

23 They also had a motion control group, which sold  
24 primarily crutches and drives and fan motors for builders of  
25 machinery.

1 THE COURT: Okay, thank you.

2 THE WITNESS: Thank you.

3 A. From there I became a consultant. What actually  
4 occurred, it was a nice transition is that I got a part time  
5 faculty position at Cornell Graduate School of Management,  
6 which I developed and taught a credit semester class to  
7 typically second year MBA program people at Cornell. My  
8 program dealt with all issues of marketing. We discussed  
9 talking about product management and new products business,  
10 case financial and financial and forecasting industrial  
11 production. I'm sorry. Intellectual property. Forecasting,  
12 if I didn't mention that. All the aspects of marketing.

13 Q. Go ahead.

14 A. I did that for three years. And so in 1989, I became a  
15 full-time business consultant. And I was really at that time  
16 until about 2000, there was really two aspects of my  
17 business. One on consulting activities. The second dealt  
18 with training.

19 If I could talk briefly about the consulting, and  
20 I'm still a consultant. I'm semi-retired and I still have  
21 primarily two clients that I have been working with for 30  
22 years, just really love and I am continuing to work with.

23 Those client, by the way, New York State Economic  
24 Development Programs and Lutron (ph), which is in  
25 Pennsylvania. They lighting control systems.

1           From the consulting prospective, my primary focus  
2 was new products, revitalizing existing business. I look at  
3 market opportunities, strategy, markets requirements  
4 competition, forecasting, profit and loss.

5           I will typically work with the senior management  
6 executive team. I will typically work on a short shirt-  
7 sleeve basis with their team. The team would be VP,  
8 director, manager of marketing and sales and new products,  
9 engineering, etc. And my primary focus typically, as  
10 independent objective, let's launch this new product  
11 correctly.

12           Because the downside of launching a new products  
13 and failing is huge and very significant number of new  
14 products fail, so I am there as an independent person to just  
15 be objective and clean and in some cases talk to the  
16 executive and say we may be going to the wrong direction. I  
17 am unfortunately a barer of bad news many times.

18           Again, because I am an engineer, I do market  
19 research. I am fact and I am just factoring that's only  
20 thing I can do. You can't do, especially for executive, is  
21 to launch a new product and it fails, and then they look at  
22 me. So I have to be objective and I try to bring that single  
23 objective to this case.

24           The clients on the Fortune One Thousand companies  
25 would include Borax, Ingersoll Rand, Motorola, Lockeeh (ph)



1 Martin, New York State Electric and Gas, Pittsburgh, Pittsburgh  
2 Corning, Rubber Maid. I try to pickup some of those  
3 clients. You might be familiar. And all of these are  
4 included in my CV, which is included in my report on my  
5 website.

6 Q. Mr. Smith, those client that you just referred to with  
7 respect to your consulting; is that correct?

8 A. That's correct. That's correct. Those are the Fortune  
9 One Thousand companies. Some are a little smaller than that.  
10 Primarily Fortune One Thousand would include Lutron (ph).  
11 You wouldn't think of it as privately owned company. They  
12 have sales of over one billion dollars, out in the Allentown,  
13 Pennsylvania area. Horton. Clancy. New York Revitalization  
14 Client. We could talk about that if you want.

15 I have three family owned businesses that involved,  
16 all of which are very successful. Two with my son. One  
17 consider sense up in Albany, New York. We established and  
18 formed that business and worked with him very closely for  
19 about five years on that and then he sold that portion of the  
20 business and went on to another business called Cobra Firing  
21 Systems. Cobra Firing Systems is a business that ignites  
22 fireworks. He doesn't sell or ignite the fireworks. He just  
23 sells electronic equipment that does. It's a very successful  
24 business.

25 And my son-in-law also involved in his businesses

1 also. And he lives here in New York with my daughter.

2 So that's primarily my consulting activity yes. If  
3 you would like, I could talk to you about my training.

4 MR. MCGUIRE: Please.

5 A. Training. Typically, those different with a lot of  
6 different organization, the themes are very similar.

7 Q. Mr. Smith, I'm going to interrupt you right. Now when  
8 you speak to training, is this training that you provide for  
9 others or training that you've received?

10 A. Both. Both.

11 Q. Let's talk about the training you received. Could you  
12 explain to the Court what training you received.

13 A. Of course. I'm sorry. Say again, please.

14 Q. Could you please explain to the Court what kind of  
15 training you received over the course of your professional  
16 career.

17 A. Training that I have received?

18 Q. Yes.

19 A. Beyond my education?

20 Q. Correct.

21 A. Um, oh, my goodness.

22 Q. I am only asking because you just said, the training you  
23 were to explain, had to do with both with training that  
24 you've given and that you received?

25 A. That's right. I understand. Right. I don't know how

1 many professional seminars I have attended. Probably, I  
2 don't know. I've attended so many seminars over the years,  
3 especially when in corporate life.

4 THE COURT: Well, I think you did race the training  
5 as other half of your consulting career.

6 THE WITNESS: That's correct.

7 THE COURT: Why don't we stick to that.

8 THE WITNESS: Okay.

9 MR. MCGUIRE: Thank you, your Honor.

10 THE WITNESS: My training typically, product  
11 management, new products, forecasting, market research  
12 financial and intellectual property. They fall in, place.  
13 If you start to see what I was teaching and to whom.

14 First of all, I have already mentioned Cornell's  
15 program. I had two separate programs. One was official  
16 called industrial marketing.

17 Again, marketing is all of those things that we  
18 discussed. And also had a business strategy program. The  
19 primary reason Cornell brought me into their program is they  
20 wanted a practitioner. I am clearly a practitioner. That's  
21 what I do for a living. And I did that for three years. I  
22 also did some special programs for them, and for on site  
23 clients that they would have. Typically 15 to 20 people in  
24 executive education, three to five day programs.

25 I also, for American-- University of North

1 Carolina, briefly mentioning them. For three years, I  
2 developed and taught three-year program there called product  
3 management. Very, very common with other programs I'll talk  
4 about. Typically, specifically -- I'm sorry. The UNC  
5 program, three days long entitled Product Management,  
6 included all of those issues we talked about. Typically 15  
7 to 20 students I was the only non UNC on faculty.

8           Cornell, I was very proud, I received top ten  
9 awards from the students' instruction.

10           American Management, New York City headquarters  
11 42nd and Broadway. They are single largest producer of  
12 business executives seminars in the United States, possibly  
13 in the world. I worked with them for 19 years. I developed  
14 four separate programs.

15           Developed, what that means, is they would want a  
16 program, for example, one of the programs was called New  
17 Products Developing Evaluation and Launched of Successful New  
18 Products. That was a four-day program that included all of  
19 the things we are talking about:

20           How big is the market?

21           Who is the competition?

22           How do you evaluate the market?

23           How do you forecast your sales, the profits and  
24 intellectual properties, and sales chance. All of those  
25 things were included within four days.

1           Typically 15 to 20 people. Typically, literally  
2 from 7 o'clock in the morning until 10 o'clock at night.  
3 In-depth street-smart knowledgeable people, product managers,  
4 vice presidents of sales, directors of marketing and sales  
5 engineers and new products, etc.

6           I did that for 19 years. Typically once a month  
7 someplace in the world.

8           Again, there was 4 separate programs. I'll give  
9 you the details of all four. There are just variations of  
10 the them.

11           I was not only the trainer -- I not only wrote the  
12 book, but since they would have other people conduct the  
13 seminars, I was also the trainer of the trainers.

14           Over those 19 years, I had a score -- because every  
15 time you teach a seminar, you get a score. I had 3.85 of 4.  
16 I received an award I am very proud.

17           THE COURT: Those 19 years were between when and  
18 when?

19           THE WITNESS: That was -- hang on just one second.  
20 1989 to 2007.

21           THE COURT: Thank you.

22           THE WITNESS: In my CV you will see the details of  
23 the programs.

24           THE COURT: Yes.

25           THE WITNESS: Association, organizations with AMA

1 American Management Association also the management center in  
2 Europe. I did a number of programs for them, variations of  
3 AMA programs. I also did a lot of work for the Management  
4 Center, 14 years with them and 14 years with the management  
5 center. And all my clients, I have very commonly would do  
6 some form of a seminar with workshop, everything focused to  
7 their specific organization.

8           So that's a summary in relation to the training. I  
9 had one third part, if I might. What happened in 2000 I  
10 became expert witness. Since 2000, I was been involved in a  
11 number of expert witness cases.

12           THE COURT: So we'll call that the forensic part of  
13 your career, is that fair?

14           THE WITNESS: Yes, ma'am.

15           MR. MCGUIRE: Very well. Would you like to speak  
16 in general terms of the forensic part of your career?

17           THE WITNESS: Sure. 18 years I have been involved  
18 as an expert witness. Since 2000. I have been involved in  
19 56 cases, 43 written reports, 17 depositions. Three trials,  
20 and three arbitrations.

21           Of those 56 cases, 32 involved economic loss. And  
22 28 involved intellectual property I would define as  
23 copyright, trade secrets, some patents, and some trade  
24 marks. That would be a summary. That would be a high level  
25 summary of my activity.

1 Q. Mr. Smith, we talked about your experience with respect  
2 to training, your experience professional experience in  
3 general. Do you have any experience in calculating damages  
4 for loss profits?

5 A. Yes, I do.

6 Q. If you could speak to that, please, sir.

7 A. I think the most relevant would be my expert witness  
8 experience that I already mentioned, the cases for economic  
9 loss. 14 involved trial and/or depositions.

10 My consulting client projects, some people would  
11 argue that there is a huge difference between defining  
12 economic loss and a pro forma forecast of sales and profits,  
13 be it for existing and business and new products. The  
14 similarities are huge. They are really huge.

15 What you are looking at -- you are looking at  
16 identification of variables. You are looking at facts. You  
17 are looking at how big is the market. Who's the competition?  
18 What is my offering? Who is the competition offering? You  
19 have all the price issues, and all competitive issues. All  
20 those complexities that go forward.

21 What is challenging, especially challenging when  
22 talking about new products, is you have challenge because you  
23 are looking forward. In many respects calculation of an  
24 economic loss is a lot easier, because you are looking at the  
25 past. There is far fewer variables so it makes it easier to

1 quantify variables. Because so many of the facts are either  
2 known or could be quantified to some reasonable degree of  
3 accuracy.

4           The third level would be my university teaching,  
5 which I went through, suffered detail for you to understand  
6 that that the Cornell MBA, University of North Carolina,  
7 talking about second year MBA or executive level people, we  
8 are talking not just about my having a seminar in which I am  
9 providing information. These are 15 to 20 people. So these  
10 are interactive dealing with their issues. Real issues. It  
11 gives you a different level of understanding, when you are  
12 not just simply talking at them, but listening and working  
13 with them.

14           THE COURT: So there's sort of harmonizing various  
15 of your career with respect to the economic issue.

16           Do you feel that you adequately laid the ground  
17 work to request that your witness would be qualified?

18           MR. MCGUIRE: I do, your Honor.

19           THE COURT: Okay. It's ten after one. I said we  
20 will have cross examination. You are not finished with your  
21 direct. We will have any cross on the qualifications of this  
22 witness as the first order of business, and then we will  
23 continue with the direct. Okay?

24           MR. MCGUIRE: Thank you.

25           MR. SYLVESTER: Sure.



1 THE COURT: Have a nice lunch. See you back at ten  
2 after two.

3 MR. SYLVESTER: Thank you.

4 THE COURT: Thank you.

5 (RECESS TAKEN).

6 THE COURT: Back on the record.

7 You may come forward, Mr. Smith. Thank you. You  
8 may be seated, Mr. Smith. We are at that point in the  
9 presentation of this witness's testimony where he's been  
10 offered as an expert based upon his background and education  
11 and experience.

12 So any cross examination?

13 MR. SYLVESTER: Yes, your Honor. First, could I  
14 ask for a clarification?

15 THE COURT: Yes.

16 MR. SYLVESTER: This is from counsel. I don't  
17 believe that this witness is being offered in a current  
18 context of this case on any intellectual property issues or  
19 any trade secret issues, and the like. Although, there's  
20 some reference to that in his report, but I didn't hear him  
21 being qualified in any regard to those topics. I just want  
22 to be clear that I will not cross examine him with regard to  
23 those topics if he's not being offered for those.

24 THE COURT: Those issues are being dismissed.

25 Right?

1           MR. SYLVESTER: But there's still some aspect of  
2 his report which addresses it.

3           MR. MCGUIRE: That's fair enough, your Honor. The  
4 court and Mr. Sylvester are absolutely correct. The one  
5 remaining claim in this case is breach of contract. Mr.  
6 Smith has been offered as a witness. At least his  
7 credentials have been offered at this point, strictly with  
8 respect to his analysis as to damages, the association with  
9 the breach of contract claim.

10          THE COURT: Okay. Thank you.

11          MR. SYLVESTER: Thank you.

12          MR. SYLVESTER: Your Honor, I may. I have two sets  
13 of binders. What I propose to do, if it's okay with the  
14 Court, is some of these things I won't be using. But it's in  
15 here. To the extent it's not used, I'll pull it out of this  
16 binder at the conclusion of the hearing. So the only thing  
17 that remains in the binders stays with your Honor, whatever I  
18 referred to or asked to be admitted into evidence.

19          THE COURT: Fair enough.

20          MR. SYLVESTER: I'm not going to wean it out now.  
21 I do have a set for your Honor and the witness.

22          THE COURT: Okay. Thank you.

23          MR. MCGUIRE: Counsel has also be kind enough to  
24 provide me with copies.

25          THE COURT: I figured that.

1 MR. SYLVESTER: Your Honor, may I approach the  
2 witness and hand it up?

3 THE COURT: Yes. Off the record.

4 (Discussion held off the record).

5

6 CROSS EXAMINATION

7 BY MR. SYLVESTER:

8 Q. Good afternoon, Mr. Smith. How are you?

9 A. Good, thank you.

10 Q. My name is Tony Sylvester of counsel of record for Ms.  
11 Franco. I would like to ask you a few questions regarding  
12 your qualifications. If you don't mind?

13 A. Okay.

14 Q. Sir, if you take a look at Tab 1 in the binder. That's  
15 your current CV; is that right?

16 A. Yes.

17 Q. All right. And as far as you know, that's accurate in  
18 all respects?

19 A. Yes.

20 Q. And sir, let me ask you, isn't it true you never served  
21 as a chief financial officer of a company?

22 A. I have not. I've never served as a chief financial  
23 officer of a company. No.

24 Q. Thank you. And isn't it also a fact, sir, that you are  
25 not an accountant?

1 A. I'm not an accountant.

2 Q. And is it also the case obviously, that you are not a  
3 certified public accountant are you?

4 A. I'm not a CPA, no.

5 Q. Would you agree with me that the industry that NXIVM is  
6 engaged in can be called the professional success training  
7 industry?

8 A. That would be one description, yes.

9 Q. And are you comfortable with that description?

10 A. I am not an expert in relation to their subject  
11 material.

12 Q. Sir, isn't it true that you've never been employed by a  
13 company in the professional success training industry?

14 A. I just don't know what -- I am just not comfortable with  
15 what the personal success training industry is. I have been  
16 involved in training for 30 years and significant portions of  
17 the seminars that I have written and taught and still teach  
18 deal with personal success.

19 Q. Have you ever been employed by any of the companies that  
20 you identified as comparable in this case?

21 A. Define comparable.

22 Q. The companies you identified in your report.

23 A. Recognize that the American Management Association and  
24 associated companies of management center in Europe and  
25 Canadian Management Association, I worked with them for

1 decades and they includes within their reservoir of seminars  
2 just whole range of programs, including narrowly defined  
3 personal success programs, if you will. I'm not sure I am  
4 answering your question.

5 Q. Perhaps the infirmities are in the question. Have you  
6 ever been employed by Dale Carnegie company?

7 A. No.

8 Q. Ever been employed by Franklin Koby (ph)?

9 A. No.

10 Q. Have you ever been employed by Tony Robbins's company?

11 A. No.

12 Q. Have you ever been employed by NCP?

13 A. No.

14 Q. All right. Now, sir, you made reference to the fact  
15 that you have testified at three trials; is that right?

16 A. Correct.

17 Q. And were any of those in federal court?

18 A. One moment. Let me look.

19 Q. You don't need to. Is it fair to say that you don't  
20 recall whether you ever testified in federal court, as you  
21 sit here right now?

22 A. I could look in a moment if you'd like.

23 Q. Please do then?

24 A. I could be factual.

25 Q. Thank you.

1 A. No. I have not testified in a federal court at a trial.

2 Q. Yes. Thank you. Now, you are familiar with the case  
3 that is called RFMAS v SO, So?

4 A. Yes.

5 Q. Isn't it a fact you were offered as an expert on behalf  
6 of the plaintiff in that case; isn't that true?

7 A. Yes.

8 Q. And isn't it a fact that your testimony qualifications  
9 were challenged in that case, were they not?

10 A. Yes.

11 Q. And isn't it so that federal magistrate, Judge Dolinger  
12 issued a report and recommendation in recommending that you  
13 would be precluded from testify at trial as to whether  
14 defendant's actions damaged RFMAS and recommended that  
15 entirety of your report be stricken. Is that true?

16 A. That is true. The other expert was also disqualified.

17 Q. The other plaintiff's expert was disqualified as well?

18 A. Yes.

19 Q. And isn't it a fact that Federal District Judge Minero  
20 adopted the report recommendation of Magistrate Dolinger and  
21 precluded you from testifying as an expert in that case?

22 A. I'm sorry. Restate it.

23 Q. Sir, isn't it a fact that Federal District Court Judge  
24 Minero adopted the report of the magistrate judge, and  
25 precluded you from testifying as an expert in that case?

1 A. I don't know the specific of the judges or what the  
2 other people. I don't know the details.

3 Q. Have you ever read the opinion of which Judge Minero  
4 precluded you from testifying?

5 A. I remember reading some documents. I don't remember the  
6 specifics.

7 Q. Well, perhaps if you could turn to Tab 2, if you don't  
8 mind.

9 A. Okay.

10 Q. And you would agree with me that that's the federal  
11 court opinion in RFMAS?

12 A. I don't recall seeing this document before, sir. I'm  
13 not sure I understand the question.

14 Q. Well, let me withdraw it. Let me ask you this  
15 question. Is your testimony under oath that you never read  
16 the opinion of the federal district court judge wherein you  
17 were precluded from testifying as an expert?

18 A. I reviewed some documents on my exclusion from  
19 testimony. I just don't recall what specifics documents they  
20 were. This is for prospective of time. This was over ten  
21 years. This is about ten years ago.

22 Q. It was 2010. Is that right?

23 A. I had in my record, this was a 2008, 2009 case. So this  
24 is from my records, it was ten years old. I don't know the  
25 specific date of this document.

1 THE COURT: Well the date of your report seems to  
2 be September 15, 2009?

3 THE WITNESS: Okay.

4 Q. Sir. Didn't you recently prepare a declaration that was  
5 filed with this court?

6 A. I'm sorry. Ask the question again.

7 Q. Yes sir didn't you reason I will prepare and sign a  
8 declaration which was filed with this federal court?

9 A. Yes, sir, I did.

10 Q. And didn't you in that declaration discuss this very  
11 case?

12 A. Yes.

13 Q. And so isn't it fair to say that in connection with  
14 preparing that declaration and discussing this case, that you  
15 read the opinion?

16 A. In writing the declaration, I am assuming you are  
17 referring to a 11, 30, 17 declaration?

18 Q. Yes, I am sir.

19 A. I did not read this specific document, no.

20 Q. Okay. So just to be clear then. When you prepared your  
21 declaration, that was recently filed in this case, wherein  
22 you discussed among other things the RFMAS case, you hadn't  
23 even bothered to read the opinion; is that right?

24 A. I went through my notes of the case so that I accurate.  
25 But I did not specifically read this document that's in front



1 of me.

2 Q. And sir--

3 THE COURT: Wait. Where in the declaration is the  
4 reference to the case? What page?

5 THE WITNESS: Is that a question for me?

6 THE COURT: No.

7 MR. SYLVESTER: Tab 5, your Honor.

8 THE COURT: Just in the declaration. I have a copy  
9 of it here.

10 MR. SYLVESTER: Tab 31, page 15 and 16. And they  
11 just proved my point. Am I right?

12 THE COURT: Yes, exactly.

13 A. Yes. It's on page 15, starts on it page 15, my 11, 30,  
14 17 declaration, that's correct.

15 Q. And sir, are you aware that in that opinion, the federal  
16 district court judge, struck you as an expert for various  
17 reasons, including that your findings rested almost  
18 exclusively on documents that had been provided to you by the  
19 client; isn't that rights?

20 A. That's what the judge stated, yes.

21 Q. And isn't it also the case that the federal district  
22 court judge precluded you from testifying, because you had  
23 not reviewed your client's tax returns in that case?

24 A. I just don't recall the specifics. This is ten years  
25 old. I just don't recall the specific of the reasons for the

1 exclusion.

2 Q. Well, do you recall that the federal district court  
3 judge struck you as an expert because it was found that you  
4 had not independently verified any of the financial  
5 statements that was provided to you from counsel?

6 A. Again, this is ten years ago, I do not recall the  
7 specifics of the judge's conclusions.

8 Q. And so, would it be fair then to say, that you don't  
9 recall that the judge also struck you as an expert because he  
10 found that you had no expertise at all in the industry that  
11 was at issue?

12 A. Again, I don't recall the specific of that statement of  
13 the Judge.

14 Q. But I believe you say, you had read it at some point; is  
15 that fair to say?

16 A. Again, I don't recall what specific documents I read. I  
17 read a specific document ten years ago that dealt with my  
18 execution from testimony.

19 Q. Do you recall at that case that the federal court said  
20 that your testimony is so riddled with logical errors that a  
21 jury might be better equipped to understand the evidence  
22 without exposure to your proffered testimony? Do you  
23 remember the judge saying that?

24 A. I don't recall the specific.

25 Q. Well, do you recall the Court also criticized your

1 methodology?

2 A. Was that a question?

3 Q. Yes.

4 A. What was your question?

5 Q. Isn't it also a fact that the federal court in that case  
6 also criticized the methodology that you used in reaching  
7 your opinion?

8 A. I don't recall the specifics.

9 Q. Do you recall that the federal court found that your  
10 opinion was inadmissible because you did not control and  
11 consider other possible causes of your client's damages?

12 A. I don't recall the specifics of the judgment.

13 Q. Do you recall that the federal court there determined  
14 you were unqualified to make financial projections?

15 A. I don't recall the specifics.

16 Q. So therefore you don't recall that the federal court  
17 made the statement that you were not qualified to offer a  
18 calculation of plaintiff's loss sales or profits?

19 A. I know that I was excluded from testimony. I don't  
20 recall the specifics of the ruling.

21 Q. One of your opinions in that case had to do with  
22 profits, didn't it?

23 A. Yes.

24 Q. And so part of the opinion that was precluded by the  
25 federal court, because it found that you were not qualified,

1 was your opinions on profits; isn't that right?

2 A. Again, I don't recall the specific of the reason for the  
3 exclusion.

4 Q. Well let's turn to another federal court case, Southern  
5 District. Do you have a better recollection of the case  
6 whole among Moolsan v. Monito Mineral Water?

7 A. I am not sure how to answer that question?

8 Q. Well, take a look at Tab 3, please.

9 A. I'm looking at my 11, 30, 17 report, and I remember that  
10 case. I just don't know what your questions are.

11 Q. Take a look at Tab 3 in my binder if you don't mind.

12 A. Okay.

13 Q. Have you read that opinion at any point in time?

14 A. No.

15 Q. So your testimony, that despite the fact that you were  
16 precluded by that federal judge, you never bothered reading  
17 the opinion?

18 A. It was not available to me.

19 Q. And it's true that you were retained by a plaintiff in  
20 that case as a damage expert, correct?

21 THE COURT: What's the date of that opinion?

22 Sorry. The second case you're talking about.

23 MR. SYLVESTER: December 2, 2010.

24 THE COURT: 2010. Okay. Thank you.

25 Q. You were engaged as an expert to serve as a damages

1 experts; isn't that right?

2 A. That's correct.

3 Q. And the other side moved in limine to preclude your  
4 testimony, just like Ms. Franco is doing here; isn't that  
5 right?

6 A. I don't know how to answer that question. I was not  
7 aware-- I wrote a written a report for this case. The  
8 attorney dealt with a company in Korea. The attorney was  
9 Korean. The client was Korean--

10 Q. Sir, I don't understand what that would have to do with  
11 anything. I'm sorry.

12 A. And there was very limited communication.

13 Q. Okay.

14 A. What I am saying here, I was provided some information.  
15 I wrote a report. I was never deposed and I was not even, I  
16 did not even realize that there was a challenge or that I was  
17 not permitted to testify. I didn't know any of that. It  
18 simply disappeared. I wrote a report and I heard nothing  
19 more.

20 Q. In that report, you offered five separate opinions;  
21 isn't that right?

22 A. I don't recall.

23 Q. So you don't recall if the court struck all five of your  
24 opinions?

25 A. Again, I knew nothing about it. I was aware of nothing

1 that occurred after a report.

2 Q. Are you aware that the federal court in that case struck  
3 your opinion regarding economic losses because they found that  
4 ever bit of evidence that you cited was speculative,  
5 contradictory or unreliable?

6 A. I don't know the specifics, sir.

7 Q. Are you aware that disqualification was affirmed by the  
8 Second Court of Appeals?

9 A. I don't know the specifics.

10 Q. To be clear though, you were aware that you were  
11 stricken as an expert, true?

12 A. I only learned that three or four years ago.

13 Q. And in last three or four years, you didn't bother to  
14 read the opinion to find out why you were stricken?

15 A. I don't have, I don't have a page or account. I don't  
16 have access to that information.

17 Q. You have access to internet?

18 A. I do.

19 Q. Are you aware that you can search a case on the internet  
20 and get the opinion?

21 A. I did not know that that was available.

22 Q. In connection with declaration that you just filed with  
23 the court, did you read the opinion?

24 A. I'm sorry. What was the question.

25 Q. Well, I think identified your declaration as being in

1 the November time frame, isn't that right, last year?

2 A. Yes, that's correct.

3 Q. And in that declaration, you gave some commentary about  
4 the Monito Mineral Water case, didn't you?

5 A. I did.

6 Q. Are you telling me and telling this Court, that despite  
7 that commentary, you still hadn't read the opinion during  
8 that point in time, that's your testimony?

9 A. The opinion, the judge's?

10 Q. Yes. The judge's findings?

11 A. No, I have not.

12 Q. To this date, you still haven't read it?

13 A. No, I have not.

14 Q. Well, you also, 2014 offered as an expert in a federal  
15 court case called Triboro Quill (ph); isn't that right?

16 A. Yes.

17 Q. And that is Tab 4 in your binder, sir. Take a look.

18 THE COURT: Could I interrupt? I am on the wrong  
19 page. On page 16 of Monito, little v paragraph 5?

20 THE WITNESS: Yes.

21 THE COURT: Challenged comments. Did you write,  
22 made communication difficult. The client was very pleased  
23 with my report. I was never informed about the Daubert  
24 challenge. So when you wrote that paragraph that was you did  
25 know that it was stricken?

1 THE WITNESS: No. When I wrote this? When I wrote  
2 this report dated 11, 30, 17, I did know.

3 THE COURT: You did know.

4 THE WITNESS: I only learned of this, I don't know  
5 the exact time frame, three or four years ago I learned.

6 THE COURT: And you did not read the judge's  
7 opinion.

8 THE WITNESS: No, ma'am. No.

9 THE COURT: All right. Just getting my head  
10 straight.

11 Thank you.

12

13 BY MR. SYLVESTER:

14 Q. Sir, we are talking about the Triboro Quill case. Do  
15 you recall that case?

16 A. Yes.

17 Q. And in that case, weren't you retained as an expert to  
18 offer an opinion on contract interpretation as well as  
19 projection of damages; isn't that right?

20 A. Yes.

21 Q. And are you aware that in connection with the motion for  
22 summary judgment, the other side moved to strike your report  
23 in its entirety?

24 A. I don't know the specifics. I know I was excluded from  
25 my testimony.



1 Q. So you do know that the federal court in that case  
2 struck your opinion in its entirety; isn't that right?

3 A. I don't know that it was in its entirety. Yes, I was  
4 not permitted to testify at trial.

5 Q. Are you aware that federal court in that case rejected  
6 your damages opinion because it found that there was no  
7 assurance that it was grounded in sufficient or reliable data  
8 or principles or methodologies; isn't that true?

9 A. I don't recall the specifics of the ruling.

10 Q. Isn't it a fact that that case-- that's the source of  
11 data was the counsel of record?

12 A. An one-- if there were a thousand pages of information  
13 provided, the attorney provided one half of one page on the  
14 telephone because he wasn't able to provide me with the  
15 written document.

16 Q. Sir, would you agree with me that it seems like one of  
17 the of lessons of three opinions was that the Court was  
18 looking to you as an expert to independently verify the data  
19 that you were relying upon? Isn't that fair?

20 A. You do the best you can with the information provided,  
21 and try to be as objective and as thorough and effective as  
22 you possibly can.

23 Q. I appreciate that, sir. I need an answer to my  
24 question. Isn't it a fact that a lesson to be drawn from  
25 those three opinions, is that is the Court looks to you as an

1 expert to independently verify the data and information that  
2 you are relying upon?

3 A. You cannot independently verify every piece of  
4 information that you are provided. It just isn't possible.

5 Q. Okay.

6 A. You do the best you can to be certain that it is quality  
7 information, that it's independently verified, if you will,  
8 but there's no way in what you can verify every piece of  
9 information. Otherwise, you would have to replicate the  
10 profit and loss statement. It's just impossible for you to  
11 look even and ever data point within a P and L and reconfirm  
12 the data points.

13 Q. You are familiar with the fact that companies have  
14 original books and records; isn't that true?

15 A. Yes.

16 Q. In any of those other three cases, where you were  
17 stricken as an expert, did you ever look at the original  
18 books and records of any of your clients?

19 A. I looked at all data, working data in all three of those  
20 cases. Yes.

21 Q. In this particular case, where you are being offered  
22 here, did you look at any of the original books and records  
23 of NXIVM?

24 MR. MCGUIRE: Your Honor, I am going to object.

25 This is getting beyond the scope of Mr. Smith's

1 qualifications. I did not yet get into the data that Mr.  
2 Smith reviewed and/or methodology.

3 THE COURT: I think Mr. Sylvester has tied the  
4 question into the qualifications of the witness, because he's  
5 talked about three different cases and he's asking the  
6 witness whether or not a core problem with each opinion was a  
7 failure to look at raw data.

8 And then the witness was asked whether -- sorry--  
9 to have verifiable data.

10 And the witness said he did look at raw working  
11 data on those three. And I think it's fair to ask whether he  
12 look at NXIVM. So I'll overrule the objection for that  
13 reason.

14 Q. Sir, do you have the question in your mind?

15 A. Please, ask the question again.

16 Q. Yes. Sir, isn't it a fact that in this case you did not  
17 look at any original books and records related to the  
18 financial of NXIVM?

19 A. Define original?

20 Q. Documents, books and records in the possession of  
21 NXIVM?

22 A. If you will refer-- I want to answer your question. If  
23 you look at my report dated February 3, 2017, page 26, many  
24 of these documents are-- Sorry. One second. I'm sorry. Go  
25 20, page 25, I believe.

1 Q. Is that the list of documents' page?

2 A. These are the documents that were provided-- I'm sorry.

3 You had a question.

4 Q. You are referring to the appendix; is that right?

5 A. Yes.

6 Q. I am with you. Page 25.

7 A. If you go to page 26. First of all-- I'm sorry. On  
8 page 25, if that is a complete listing of the documents that  
9 were not attached. And many of these documents, including  
10 depositions, had detailed listings of exhibits which I drew  
11 upon for my analysis and some of those. I don't have right  
12 in front of me. Some of those were original documents from  
13 NXIVM. If you look at page 26--

14 Q. Sir, on that, do you recall if any of those were  
15 financial data or information?

16 A. Not as I sit here today.

17 Q. All right.

18 A. If you go to page 26, these documents I did include in  
19 my appendix.

20 Again, not to repeat myself. But many of the  
21 documents that I listed on page 25, I didn't completely list  
22 each and every exhibit that they had included. But some  
23 portions of those were financials and raw data, etc. On page  
24 26--

25 Q. May I stop you there, sir. You're not suggesting that

1 you looked at something relevant to your opinion, but didn't  
2 identify it on page 25, are you?

3 A. Plus 26.

4 Q. And you are not suggesting that you relied upon  
5 something that didn't identify, are you?

6 A. No. No.

7 Q. Okay.

8 A. If you look at page 26 in my a appendix, it says NXIVM's  
9 profit and loss statements 1998 through 2013. And I included  
10 those as attachments.

11 If you look at number 4, NXIVM's seminar records,  
12 2002 to 2018.

13 If you would look at number 6, NXIVM seminar  
14 participants.

15 MR. MCGUIRE: Your Honor, I'm just getting -- Mr.  
16 Smith, I believe you've misspoken with respect to NXIVM  
17 seminar records, 2000 to 2008, not 2018.

18 THE WITNESS: Okay.

19 THE COURT: Thank you.

20 Q. Sir, these were provided to you by counsel?

21 A. They came through counsel.

22 Q. Would that be Mr. Crockett?

23 A. They were provided to me through counsel, yes.

24 MR. SYLVESTER: Your Honor, I have nothing  
25 further.

1 I think at this point, we would urge the Court to  
2 disqualify him for lack of qualifications, based on what you  
3 just heard and based upon the facts. That's what happened  
4 here, despite the teachings of those three federal court  
5 cases, this is exactly the same.

6 We are dealing with an expert who received  
7 materials from client counsel, however it may be, did nothing  
8 independently to verify it. Didn't go and look at original  
9 books of entry.

10 And it seems to me, that perhaps he, with all due  
11 respect to the witness, had not learned a lesson because the  
12 proposed expert hadn't read those three opinions.  
13 Nonetheless, three federal judges, plus federal Justice  
14 Dolinger laid out is precisely where we are stuck here now in  
15 terms of information. And I think it does go to  
16 qualifications. Because if you have a situation where  
17 somebody is stricken three times by three separate federal  
18 courts over a pattern of conduct, and yet walks into this  
19 courtroom and has the exact same pattern in place, then that  
20 goes to qualifications.

21 As far as I am concerned, you know, that was, fool  
22 me once, shame on you. Fool me twice, shame on me. How about  
23 the third time when you have been instructed that you've done  
24 things wrong, but you're going to stubbornly stick to your  
25 way of doing things. I think that goes to qualifications. It

1 doesn't go to reliability and methodology. I submit that he  
2 isn't qualified to testify based upon my presentation.

3 THE COURT: I have a question. Kind of tailing off  
4 of what Mr. Sylvester said.

5 How do you view your role when you are engaged to  
6 provide a forensic report on loss profits? What do you think  
7 you're supposed to be doing in terms of presenting a report?

8 THE WITNESS: I'm looking to secure accurate  
9 company data, which is the source of that data.

10 In most cases, I was able to do this also within  
11 the NXIVM case, I'm looking for several documents that are  
12 reporting the same information but in different formats,  
13 hopefully in different time frames.

14 For example, within the NXIVM's case, I was able to  
15 look at individual financial profit and loss statements  
16 prepared for the year.

17 I was then able to identify other internal working  
18 spreadsheets that would include the same categories of sales,  
19 revenues categories, expenses, both on a profits and loss and  
20 balance statement, which I was then able to prepare that  
21 statements often times I think in the NXIVM case I think it  
22 was eight or ten year time frame. I would compare that  
23 document, prepare extra layer with some of the internal  
24 working documents that were prepared for the year. And then  
25 I was able in NXIVM's case I was provided access to three

1 separate profits and loss statements, and then able to then  
2 cross connect the sales and expenses to those internal  
3 documents.

4 THE COURT: When you say, "I was able to, in NXIVM's  
5 case, was provided access to three separate profit and loss  
6 statements," you indicates that--

7 THE WITNESS: Tax returns. That was my  
8 misstatement.

9 THE COURT: Oh, tax returns. I see. And those were  
10 not attached to your report, correct? Page 25 has documents  
11 not attached, documents reviewed and attached, correct?

12 THE WITNESS: That's correct. I have them here.  
13 But yes.

14 THE COURT: Okay. And Mr. Sylvester, those are  
15 part of the record, but you said, I think, there was an  
16 objection to not having been signed, was that the issue with  
17 these?

18 MR. SYLVESTER: There's a number of issues. Issue  
19 number one: Those tax returns, by the way, 99, 2000, 2001.  
20 Before the damage period that this witness is even being  
21 offered on. That's number one.

22 Number two: They are unsigned, which is a red  
23 flag for anyone in terms of having verifiable accurate data.  
24 Because if it's not signed, you cannot be certain that this  
25 is the return that got filed.



1           But more to the point, to go back to a fundamental  
2 problem, and that is a Rule 703 problem. And that is, how  
3 can the expert rely upon something that I never got in this  
4 case? Pull the IRS returns out, there's no Bates numbers on  
5 them. It never came to me in discovery. So I was not ever  
6 able to cross examine the person who should have been signing  
7 this.

8           Frankly, talking about this chasm. It's really, I  
9 am the one that's left in the lurch here as litigator and  
10 trial counsel, because I don't even have the information at  
11 my disposal in order to properly prepare the case. And it  
12 was never provided.

13           So 703 is a firewall against this witness, because  
14 everything that he's relying upon are things that were not  
15 provided in discovery. Pure and simple.

16           I could demonstrate that until the cows come home  
17 to the satisfactory-- to your Honor. Everything, as you know,  
18 gets Bates numbered and so forth. This simply didn't happen  
19 in this case and it simply wasn't the subject of testimony by  
20 the 30(b)(6) witness. I know I'm lapsing back. It's what I  
21 talked about earlier.

22           But my problems with those tax returns and this  
23 witness talking them in any way, shape or form, it runs smack  
24 into the 703 problem.

25           In order for him qualify himself, or I should say,

1 in order for the parties to try to qualify him, that he did  
2 things right, that he did not lapse into the same problems  
3 that three federal judges identified as being reasons to  
4 preclude him, he's relied upon documents which he can't rely  
5 upon. It's unfair.

6 THE COURT: Well, you understand Mr. Sylvester's  
7 problem. That he's saying that you had access to documents  
8 that (a) were not provided to him in the format that the  
9 court would want; that they are verifiable documents.

10 Did that bother you when you were given you  
11 unsigned tax returns for those three prior years?

12 THE WITNESS: First of all, 1999 was signed by the  
13 CPA. All of the tax returns that I received and reviewed  
14 were indicated who prepared them. And they were all CPA's in  
15 all years. And number one was actually signed by the CPA  
16 which was here. It was not signed by NXIVM -- in my  
17 experience, that is pretty common. When someone provides a  
18 tax return coming from their files, they sign those that go  
19 to the government, but do not sign those that are in their  
20 files, very common.

21 THE COURT: So you were not bothered by the fact  
22 that they weren't signed?

23 THE WITNESS: We always want the best possible  
24 information. And this was the best possible information I  
25 could get.

1           THE COURT: Did you request signed ones? If you  
2 remember.

3           THE WITNESS: I do remember. I requested the best  
4 information I could. I requested additional tax returns and  
5 just simply weren't available.

6           Again though, what was important, because the only  
7 thing I can do is try to get reliable solid information. We  
8 talked about before. So independently checked where you  
9 possibly can to cross and recross. For example, this is --  
10 I've already described, if you will, as to how I was able to  
11 verify different documents prepared in different time-frames  
12 by different people with profit and loss, and then crossed  
13 that with the tax return.

14           So when you start to see things that are not  
15 precisely the same, but plus or minus one percentage point,  
16 then it gives you comfort in many, many cases that were to  
17 the exact penny. And this gives you great comfort, seeing  
18 something that developed in one year and eight years later  
19 you see the same exact number on a different document, most  
20 probably prepared by someone else, it gives you comfort.

21           THE COURT: What did you consider the dispute  
22 between the parties to be when you were engaged to provide a  
23 forensic report?

24           THE WITNESS: Sure. Sure. Ms. Franco took a  
25 confidential report. I recall it was 386 pages of -- I could

1 check, it was either 386 or 286. I forget. But it was a  
2 confidential that was developed and copyrighted and protected  
3 aggressively by their internal intellectual property  
4 procedures.

5 By the way, I visited NXIVM in Albany after I  
6 received a set of documents. That gave me an opportunity to  
7 directly talk with the financial individual and several other  
8 individuals in Albany, to have the documents in front of me,  
9 to please help me to understand this and that. Do you have  
10 the additional documents that I could have here to revalidate  
11 this information is accurate. And during that meeting, some  
12 additional information, through counsel, was also provided  
13 based upon my very specific request.

14 And those we could talk about later if you want all  
15 the specifics and the when and where.

16 Also independent, this is separate from the  
17 financials, but I think it's important. When we get into  
18 the, looking at the relationship between Ms. Franco's taking  
19 of the confidential documents, which then ended up with may  
20 be not precise with the sequence, but ended up with Rick Ross  
21 and then ended up with Dr. Hoffman and Dr. Martin who wrote  
22 papers based upon the documents, based upon Franco's  
23 documents, 386 pages, including her notes which was  
24 confidential.

25 Based upon those notes and based upon that

1 notebook, they then wrote a very scathing report, using such  
2 words as halt and halt-like, etc., which then picked up by  
3 the Times Union, which had been a series of articles. Then  
4 it was picked up by Forbes Magazine, and we can talk about  
5 this later. And through those articles, we started to have a  
6 salacious kind of words, where news makes news and it spread  
7 out very rapidly. But for Ms. Franco taking the notebook and  
8 providing it to Rick Ross who then provided it to individuals  
9 who wrote the papers and then went to Rick Ross for  
10 additional publication and additional Time Union articles and  
11 a whole range of other negatives.

12           As you might imagine, these negatives concerning  
13 news had an impact of the seminar attendance. And my  
14 assignment was to, from an economic prospective, was there a  
15 substantial relationship between her taking of this manual  
16 and the impact to NXIVM's seminar sales. And my conclusion  
17 was yes, there is a substantial relationship and I am happy  
18 to show you specifically as to how I define that relationship  
19 and what that was relationship was. It's then translated  
20 into lost sales and lost profits, which I hope answers your  
21 question.

22           THE COURT: Insofar as you were offering an expert  
23 opinion on the relationship between the turnover of the  
24 notebook, the Franco material, this is from the seminar, you  
25 opined that there was a direct relationship between that

1 event and the lost sales?

2 THE WITNESS: Yes.

3 THE COURT: What in your background gives you an  
4 expertise to interpret that, as opposed to a post hoc proctor  
5 hoc, dangerous kind of conclusions in terms of your own  
6 expertise?

7 THE WITNESS: I have in-depth expertise in  
8 relationships-- to defining relationships, in relationships  
9 to physical analysis and in relationship to business  
10 analysis, in relationship to competitive analysis.

11 THE COURT: What else?

12 THE WITNESS: It's a business analysis case in many  
13 respects. You are looking at relationships and you are  
14 looking at cause and effect. You are looking at the  
15 financials. And you're looking at time and series of  
16 analysis. And you're looking at correlations. And again,  
17 I'll be very happy when we get into the details of how I did  
18 that. And how that occurred.

19 If I could go back for one other second. I wanted  
20 to go back to the point in relation to being able to validate  
21 data that really, really portends to me personally.

22 One of the data points that was important in  
23 defining relationship between Ms. Franco's actions and the  
24 impact through NXIVM's business was the number of people  
25 attending seminars.

1           NXIVM provided me two sources of raw data, internal  
2 working documents data on the attendance of seminars. One of  
3 the documents dealt with a concise summary by month as to  
4 where the seminar was and the title of seminar and the dates  
5 in which it was held and how many people attended. That was  
6 independently confirmed by some additional summary data. For  
7 example, if you look at a month, and they have X numbers of  
8 seminars, and you have detail as what was the seminar and  
9 where was it, and what was the date and how many attended,  
10 you will see additional documents then summarize that in  
11 different formats.

12           In addition to validate some of this, I went and  
13 there is a site called The Way Back Machine. You may be  
14 familiar with it. It permits you go back in time and pick up  
15 websites X years ago.

16           What I did, I went back in time and I looked at the  
17 NXIVM's annual -- looked at the NXIVM's website to see when  
18 they in fact were advertising these specific seminars.

19           So I found those seminars, cross checked that with  
20 seminars that they had actually presented, and that gave me a  
21 confirmation that that made sense. That was a good  
22 independent data check.

23           THE COURT: Okay. All right.

24 BY MR. SYLVESTER:

25 Q. On the data check you just mentioned. You confirmed the

1 dates seminars took place; is that right?

2 A. I confirmed-- let me think. I want to be precise. I  
3 was able to confirm with The Way Back Machine seminar was  
4 advertised. I, through NXIVM records, saw raw data -- not  
5 raw data, but a summary as to how many people attended each  
6 seminar and it was by date and by city, etc. And then I saw  
7 some additional summaries, which then put it with that.

8 No. The answer your question, I do not recall  
9 seeing a specific X verifiable data point to confirm that the  
10 seminar took place.

11 Q. Sir, take a look at Tab 22. I think you told me that  
12 this is important that financial information would be  
13 accurate and verifiable, true?

14 A. Yes.

15 Q. Take a look at Tab 22, sir.

16 A. Okay.

17 Q. You've seen that document before?

18 A. Yes.

19 Q. All right. And can you identify for me the amount of  
20 sales of NXIVM in 1999?

21 A. [REDACTED]

22 Q. And you got this information from NXIVM, I presume?

23 A. One moment please.

24 MR. MCGUIRE: Mr. Sylvester, so we are not  
25 operating in a vacuum. The reference Tab 22. This is page



1 22 of Mr. Smith's record?

2 MR. SYLVESTER: It is.

3 THE WITNESS: Yes. That was an internal document,

4 [REDACTED]

5 Q. And you relied upon this, I presume.

6 A. Well, if you go to my 2017 report, page 23, figure 17.

7 This is a comparison of sales between the data prepared by a

8 CPA, internal document from NXIVM, and the federal tax

9 return, and I used [REDACTED] the federal tax return was

10 [REDACTED]

11 Q. Sir, I simply asked did you rely upon this document?

12 A. Yes.

13 Q. And I want to refer you back to 1999 tax return, which

14 is Tab 18.

15 A. Okay.

16 Q. Do you have it?

17 A. One moment please. Okay.

18 Q. So now looking at Tab 18, 1999 return?

19 A. Yes.

20 Q. Isn't it a fact [REDACTED] does not appear on that tax

21 return?

22 A. Yes.

23 Q. All right. Now let's go back to Exhibit 22, and tell me

24 what the sales figure is for year 2000?

25 A. I'm sorry. Start me again.

- 1 Q. Please tell me what is the same figure for the year  
2 2000?
- 3 A. Where are you?
- 4 Q. On page 22?
- 5 A. Page 22.
- 6 Q. Look at Tab 22, if you prefer?
- 7 A. Sure. 2000.
- 8 Q. 2000, please.
- 9 A. 1597205.
- 10 Q. And look at the 2000 return. Just Tab 19.
- 11 A. One moment, please.
- 12 Q. Do you have that in front of you?
- 13 A. Okay.
- 14 Q. Does the number [REDACTED] appear on the 2000 tax  
15 return?
- 16 A. No. On the tax return is [REDACTED]
- 17 Q. Let's go back to the chart now. Tell me what the sales  
18 were for the year 2001?
- 19 A. The chart meaning?
- 20 Q. The chart-- that is Tab 22.
- 21 A. Page 22. Year 2001.
- 22 Q. 2001 please.
- 23 A. [REDACTED]
- 24 Q. And please turn to Tab 20, the 2001 tax return.
- 25 A. Okay.

1 Q. And isn't it true that the number [REDACTED] doesn't appear  
2 on the tax return?

3 A. Yes.

4 Q. Okay. Thank you.

5 MR. SYLVESTER: Your Honor, the point here is I  
6 haven't seen -- by the way, the discovery to complete a dead  
7 horse, which I can do better than anyone as my teenagers will  
8 tell you in a heart beat, even though I didn't see either the  
9 internal spread sheets with the sales, which I never did. Or  
10 the tax returns, which I never did. Or ever examined the  
11 witnesses with regard to these documents. The fact that they  
12 don't fit is the end of this.

13 Because we're not playing horse shoes here. It  
14 can't be close. And the point is -- that goes to the  
15 prejudice, if I had had these materials in discovery, you  
16 could only imagine the deposition which, one-- what was the  
17 disparity, it was kept of me. And the reason kept from me is  
18 because it's married to a totally different damages theory.  
19 That's why I suppose I am not a contributing any ill-conduct  
20 to anyone.

21 THE COURT: You're saying it wasn't kept from you  
22 out of malingering and it wasn't relevant to the case?

23 MR. SYLVESTER: It wasn't relevant. Because there  
24 was a clear linkage and marriage, if you will, to a  
25 well-formulated damage theory, which was from the amended

1 complaints onward. And the point is that this goes to  
2 qualifications because we're talking about someone who is  
3 faced with disparities in all three years. And I don't care  
4 if it's one percent. I don't care if it's five percent. The  
5 numbers don't work.

6           The immediate thing to do causes-- this causes  
7 someone to say it's an inaccurate period-- end of story. And  
8 goes to qualifications against the backdrop of three federal  
9 judges and federal magistrates relying on unreliable  
10 information-- which is a no, no and cause for preclusion and  
11 methodology preclusion and all those things that were there.

12           When faced with two fact numbers that don't match.  
13 I don't care 2 or 5 percent, it makes no difference-- they  
14 have to match precisely. That's the whole point. And by the  
15 way, this goes to reliability in spades. Later, if he ever  
16 got there that goes to the core question and that goes to  
17 qualifications.

18           I implore the Court, if you don't mind look at it  
19 from our perspective. We're dealing with somebody that's  
20 disqualified and was given almost a menu of things that he  
21 did wrong as a road map. Don't do this again. Here we are  
22 again.

23           Thank you. I don't have anything further.

24           THE COURT: Any redirect on the issue of  
25 qualifications?

1 MR. MCGUIRE: Your Honor, briefly. And I'll just  
2 get into this bit with respect to what Mr. Sylvester was just  
3 asking the questions about the alleged disparities between  
4 the calendar years and exact revenues.

5 THE COURT: Yes.

6 ^^ BY MR. MCGUIRE:

7 Q. Mr. Smith, do you recall being asked to flip back and  
8 forth between Tab 22 and the various tax years that you were  
9 asked questions along and the lines. You would agree that  
10 what was in-- what was in Tab 22, that number did not show up  
11 in a given tax year; do you remember that?

12 A. Yes.

13 Q. Could you give the Court an explanation as to why the  
14 exact number would not correspond?

15 A. Sure. This is not only a economic loss, you need to  
16 estimate lost sales. You also need to estimate lost  
17 profits. And when you look at lost profits, tax returns are  
18 prepared under different accounting standards than internal  
19 documents that are verified by a CPA. And you don't want to  
20 mix up apples and oranges. You end up in trouble very  
21 quickly.

22 So it was a decision to make as to whether I use or  
23 for these three precise years for sales, the tax return  
24 numbers or the numbers that came from the CPA. Recognizing,  
25 if you look at page 23 figure 17 in total, 3.4 percent

1 below.

2           If you go to-- I don't mean to jump ahead, but I  
3 think this is significant. If you go to it in my report page  
4 18, figure 11. You will see a graph like this. One of the  
5 ways in which I forecasted the but for sales was a best fit  
6 historic curve-- customer practice. As a point of interest  
7 the correlation with this best fit line and the sales  
8 history, as could you see it is a .99 that's almost a perfect  
9 correlation.

10           Now, if I would have used the tax return  
11 information my sales forecasts would have been higher. An  
12 unaudited number from the CPA was lower than the tax return.  
13 So to use unaudited rather than the audited-- rather than the  
14 tax return had two advantages. One, it gave me a better  
15 number for the percent gross profit. And from a prospective  
16 of importance, the percent profit is significantly more  
17 important than the revenues forecast. Because there's a  
18 leverage there.

19           Secondly, the use of internal data prepared by the  
20 CPA, it gave me a conservative forecast. So I had a point  
21 error on the low side from the sales forecast. And it's  
22 going to increase my accuracy from the estimate of the  
23 percent lost profits.

24           THE COURT: All right.

25           THE WITNESS: This was not given in any way, shape

1 or form, I'm demonstrating clearly in this report that this  
2 is what I did and why I did it. As one other data point.  
3 And right at the last minute of my report. I didn't have a  
4 chance to bring it in, I received the 2002 tax returns. And  
5 the 2002 tax returns were 0.0 percent difference between the  
6 internal documents and the federal tax return.

7 THE COURT: Okay. Anything else on this, Mr.  
8 McGuire?

9 MR. MCGUIRE: One point?

10 THE COURT: Sure.

11 BY MR. MCGUIRE:

12 Q. Mr. Smith, Mr. Sylvester asked you at some length, and I  
13 suspect that it was at some discomfort to you about those  
14 cases in the Southern District of New York where you were  
15 disqualified.

16 A. Sure.

17 Q. You spoke to all of those cases in a declaration that  
18 you provided in 2017, correct?

19 A. Yes. Yes.

20 Q. It was not your intent to come before this Court and  
21 pretends-- it was not your intent to come before this Court  
22 and hope that nobody found out about those prior  
23 disqualifications was it?

24 A. No.

25 MR. MCGUIRE: Your Honor, on the subject of

1 qualifications I rest.

2 MR. SYLVESTER: One question, your Honor.

3 THE COURT: Yes.

4 ^^ BY MR. SYLVESTER:

5 Q. Sir, isn't it a fact that-- don't you state so on page  
6 23 of your report that you declined to vouch for this CPA's  
7 professional performance?

8 THE COURT: You're speaking the same CPA that was  
9 involved in the--

10 MR. SYLVESTER: Unaudited financials.

11 THE COURT: Yes.

12 Q. Do you have page 23 of your report, sir?

13 A. Yes, I do.

14 Q. Do you see in the first paragraph that you make the  
15 statement, I do not vouch for the CPA's professional  
16 performance as I'm not a CPA.

17 Do you see that statement, sir?

18 A. Yes.

19 Q. And would you agree with me that by vouch, you mean you  
20 are not contending that that is accurate? Let me withdraw  
21 that.

22 By vouch, don't you mean that you're not  
23 guaranteeing the accuracy of the CPA's performance?

24 A. I also state in that report that the CPA has an ethical  
25 obligation to insure unaudited financials comply with certain



1 public standards and I am relying on those financial  
2 statements.

3 Q. Sir, do you know what a compilation is?

4 A. Yes.

5 Q. What is it?

6 A. Pardon?

7 Q. What is a compilation?

8 A. I'm not sure I am comfortable to give you a precise  
9 definition of a compilation.

10 Q. To be clear. How long have you been in the business  
11 world?

12 A. 50 plus years.

13 Q. And you're not prepared under oath in this federal court  
14 to give me a definition of what a compilation is-- is that  
15 not true?

16 MR. MCGUIRE: If we could get what a compilation in  
17 what context objection.

18 THE COURT: Let's see if the witness can respond to  
19 the question. If you want to offer your own professional  
20 experience as a definition I would like to hear it.

21 THE WITNESS: No, I'm not comfortable in trying to  
22 speak a definition as to that.

23 THE COURT: Okay.

24 Q. Would you agree by the use of the word vouch you are  
25 stating you are not guaranteeing the accuracy of the CPA's

1 professional performance?

2 A. I'm not sure how to answer that question.

3 MR. SYLVESTER: I'll withdraw it. I am prepare to  
4 argue this because I think this goes to the core elements,  
5 your Honor.

6 THE COURT: I have just a question.  
7 You have testified at three trials?

8 THE WITNESS: Yes.

9 THE COURT: Were they jury trials?

10 THE WITNESS: Yes.

11 THE COURT: And what was the purpose of your  
12 testimony in these jury trials?

13 THE WITNESS: Well--

14 THE COURT: No, I don't mean individual. What did  
15 you view you were there to do visa via the jury?

16 THE WITNESS: As an expert in a specific subject,  
17 my objective is to help the jury understand with my  
18 professional education and experience the subjects at-hand.

19 THE COURT: Okay.

20 THE WITNESS: Number two--

21 THE COURT: And the jurors, I'm sure you've heard  
22 the judges say any number of times to their jurors that, you  
23 are the finders of-- you are the factfinders.

24 Have you heard that term before?

25 THE WITNESS: Yes, I have.

1           THE COURT: To the extend that you were offering  
2 your experience and training as an aid to the jurors, you  
3 were aware that they were going to use what you said, and if  
4 they believed what you said, that they were going to find as  
5 facts that something or other happened.

6           THE WITNESS: Yes.

7           THE COURT: Correct, they weren't there. And  
8 normally a witness testifies what as to that witness saw or  
9 smelled or touched, or could testify about what it heard or  
10 saw. You couldn't do that. But you were permitted to  
11 testify as a result of your experience and training with  
12 respect to documents that were not necessarily within the  
13 jurors' kin, correct?

14          THE WITNESS: Yes.

15          THE COURT: Okay. Is it fair to say that if they  
16 believed you that they had the right to accept that what you  
17 were talking about was based upon real facts-- truth.

18          THE WITNESS: Absolutely, yes.

19          THE COURT: Okay. In this case there will be  
20 anywhere between eight and ten folks sitting in that jury box  
21 and they can't decide the case based upon a majority rule.  
22 In federal court they have to be unanimous as to their  
23 findings. And if your report were to influence a decision in  
24 favor of NXIVM and the jurors, who will never have to tell us  
25 if they ruled in favor or find in favor of NXIVM, nobody asks

1 them, how come you made up your mind. All we do is, how do  
2 you find and they tell us and they go home.

3 THE WITNESS: Sure. I understand.

4 THE COURT: But if they in fact turned out to be  
5 persuaded in large part by your report, are you prepared to  
6 say to all of us that you're satisfied that you did not lead  
7 them astray, because you gave them not your opinion based  
8 upon numbers that somebody else gave you, but your opinion  
9 based upon the real revenues, the real numbers in terms of  
10 the attendance, or really the business results year by year  
11 post revelation of the Franco binder. And if you're prepared  
12 to say that they found correctly because your expert report  
13 was based on real numbers-- tell us why. Why is your report  
14 based on real numbers?

15 What I'm hearing Mr. Sylvester saying is and  
16 correct me if I am wrong, Mr. Sylvester. Is that other  
17 courts wouldn't let you get up and attempt to give the jury  
18 an opinion that they could rely on or use in their findings.  
19 Those judges said, no, we can't let Don Smith testify because  
20 what he was relying on wasn't shown to be accurate  
21 information. And Mr. Sylvester is saying, here you go, you  
22 are doing it again-- am I correct?

23 MR. SYLVESTER: That is correct, your Honor. That  
24 is what those courts did. They found that under the prongs  
25 of 702, you have to look at the reliability and information.

1 And the courts in each of those situations, troubled by the  
2 mode in which this particular expert obtained the information  
3 and recognizing that it was either for counsel and client,  
4 wasn't an independent verification and sign post there that  
5 permitted the court to be not comfortable. That this expert  
6 could do just what you've described. That is to say these  
7 numbers are rock solid-- I'm going with it.

8 In fact, there was one court, with all due respect  
9 said, what had happened here was simply a graphing exercise  
10 that could be done, because it was a straight line in terms  
11 of sales and increases. And chastised experts to try to  
12 opine along those lines. But the fundamental principles was,  
13 what are we doing here. We don't know for sure that these  
14 numbers are accurate and we're relying upon data that has not  
15 been individually and personally verify. We're relying on  
16 data which could be inaccurate.

17 And this individual, in addition does not have  
18 specialized expertise in the industry. In fact, the case in  
19 which I am thinking it was in the jewelry industry. We are  
20 in the same situation here. You have no descriptions of  
21 specialized expertise in what Ms. Salzman says is a very  
22 specialized area. A very specialized world.

23 THE COURT: You're bringing in another line of  
24 arguments now.

25 MR. SYLVESTER: Yes. It goes to qualifications and

1 lots of those reasons the court said that.

2 THE COURT: I am just sticking with the question I  
3 asked Mr. Smith.

4 MR. SYLVESTER: The answer is yes.

5 THE COURT: So my job here is to do what these  
6 judges refused to do-- or not. I either say that there's the  
7 same fundamental failure to use verifiable reliable  
8 information, reliable information. Because these folks are  
9 going to rely on. Imagine that members of the public-- none  
10 of whom want to drive to Newark and none of whom want to  
11 perform jury service, no matter what I tell them. My court  
12 reporter and deputy know this. We get lunch for them and we  
13 try to keep them from running out of the courtroom. And it's  
14 fair for them to feel that this is not their problem. And  
15 that life is tough and that they're asked to interrupt their  
16 lives and sit here in Newark in a drafty courtroom and do the  
17 best that they can.

18 So it's a noble and difficult duty of citizenship.  
19 And therefore we have to be-- particularly in the case of  
20 expert testimony, we have to be very careful that our expert  
21 witnesses don't beguile jurors with their expertise, in terms  
22 of their careers and experiences, but rather serve as  
23 rigorously reliable interpreters of data that to these people  
24 it means absolutely nothing. You're the one that pulls it  
25 together and explains it. But that's why the evidence rule

1 requires reliable data.

2           So my question to you is, can you sit here today or  
3 do you want to take an overnight and read those cases and  
4 read your report and think about the arguments that Mr.  
5 Sylvester made and come back and tell me tomorrow morning? I  
6 will give you more time. But if you don't need the time--  
7 are you prepared to say, I would take a citizen before me and  
8 in his duty of citizenship make a fair decision based on the  
9 evidence in the courtroom. Not what he's read about NXIVM  
10 and Stephanie Franco or you or me, or anybody in the  
11 courtroom. They can't do any independent research. We make  
12 sure no one has read any of the articles that Mr. Sylvester  
13 was talking about. We keep people in a peaceful bubble and  
14 give them information.

15           Are you prepared to say that you're comfortable  
16 that it is a responsible thing for to you say to them, I have  
17 reliable information and here is how I looked at it and  
18 here's how I extrapolated my findings?

19           THE WITNESS: Two points, if I may. One  
20 absolutely. I been working for 52 years in which the most  
21 important thing in my job as a engineer in market research is  
22 quality information objectively reviewed-- period.

23           So this is my absolutely my best judgment. And  
24 when, in fact, they don't agree it was a conscience decision  
25 because I wanted best quality margins and information and

1 using CPA numbers, I knew that there was a modest  
2 difference. I told everyone in the report that there was a  
3 modest difference, and quantified the specifics of the modest  
4 difference with the important caveat of why I showed you one  
5 of the three forecasting tools used that creates a lower  
6 economic loss than I would have received otherwise.

7           Number two. I am really not trying to make excuses  
8 at all. The Daubert decisions were extraordinarily  
9 frustrating to me. But may I give you several data points in  
10 which will may be--

11           THE COURT: You put some in. But understand, I am  
12 not free, I don't have luxury of going behind a decision. I  
13 couldn't do my job if I went behind what people say about my  
14 decision--

15           THE WITNESS: I understand.

16           THE COURT: --I couldn't get out of bed. The point  
17 is I look at what they wrote, if it weren't reversed or in  
18 some cases if we have an appellate thing and it's reviewed,  
19 again I have to go with what they say.

20           THE WITNESS: Okay.

21           THE COURT: Now, it does bother me, and I am saying  
22 it right now that you did not as somebody working in the  
23 field of forensics read and absorbed it-- even if you had  
24 forget about it over a glass of wine, or a bottle of wine to  
25 get through it. We all have to do it. I have to read my



1   reversals. That was a reversal. You don't learn from what  
2   you did well but from your mistakes. Would you agree with  
3   me?

4                   THE WITNESS: Yes.

5                   THE COURT: So to the extent that they're part of  
6   the mosaic of my assessments of the weight to give your  
7   opinion, it certainly does bear upon my evaluation of how  
8   serious a professional you are, if you haven't even-- if you  
9   disagree with me as to with the mistakes and said to  
10  yourself, well, I know I have it right apparently the way I  
11  put it together. I couldn't get to have this guy agree with  
12  me and so I'd better figure out-- not a wrong way of  
13  presenting the data, but a clearer way of presenting the  
14  data-- so that a judge doesn't make that same mistake. And  
15  low and behold two other people followed that same suit.  
16  That is something I will be considering-- is the failure to  
17  really grapple with this as Mr. Sylvester puts it a theme.

18                   I am not saying that I agree with it as a theme.  
19  But at this point you've made logical arguments based upon  
20  what these folks and colleagues of mine wrote. So that it  
21  just sits there and it's something to think about for the  
22  future.

23                   THE WITNESS: I understand.

24                   THE COURT: But that whole issue of reliability and  
25  the information, what I'm distilling everything down to is

1 Mr. Smith is prepared to stand behind his report on the basis  
2 that he got numbers from the CPA and he got numbers off the  
3 tax returns. And what I'm hearing you say is that they  
4 harmonize sufficiently from your purposes to use them in  
5 going forward and making judgments and offering opinions  
6 regarding the effect of the Franco document on the fortunes  
7 of NXIVM, correct? Is that fair to say what happened?

8 THE WITNESS: That's correct.

9 THE COURT: Okay. It's 25 of 4 p.m. unless counsel  
10 has anything to say that is different from what was both  
11 effective examination, Mr. Sylvester, and argument, and you  
12 have both presented your witness and offered as it were  
13 rebuttal. Unless there's anything more from either side, I  
14 would like to be able to give you a ruling so that you could  
15 go forward with the next step.

16 Anything else? Mr. Sylvester?

17 MR. SYLVESTER: Yes, your Honor.

18 THE COURT: Why did I know you were going to say  
19 yes. Come up to the podium.

20 MR. SYLVESTER: I will thank you.

21 BY MR. SYLVESTER:

22 Q. Sir, could you please turn to Tab 17.

23 A. Okay.

24 Q. Do you see that?

25 A. Yes.

1 Q. Do you recognize that the accountants for NXIVM?

2 A. Yes.

3 Q. And do you see the second paragraph, it identifies its  
4 job was to prepare a compilation. Do you see that?

5 A. Yes.

6 Q. And do you see also where the accountants say, they have  
7 not audited or reviewed the accompanied financial statements  
8 and accordingly do not express an opinion or any other form  
9 of assurances on them. Do you see that?

10 A. Please let me read this?

11 Q. Sure.

12 A. Okay. Okay.

13 Q. Do you agree with me what the accountant was saying it  
14 does not in any way, shape or form, guarantee the accuracy of  
15 the compilation?

16 A. I don't see those statements.

17 Q. What do you understand the words any form of assurance  
18 on them to mean?

19 THE COURT: Well, why don't we put the whole  
20 context in.

21 MR. SYLVESTER: Okay.

22 THE COURT: What one of three paragraphs do you  
23 feel is the statement that you want this witness to respond  
24 to?

25 MR. SYLVESTER: Well, yes, your Honor, the point

1 here is that-- well let me establish this.

2 Q. You have not seen this document before today have you?

3 A. No.

4 Q. So NXIVM never provided this to you-- is that fair to  
5 say?

6 A. No, I don't recall this document.

7 Q. Do you have an understanding of what the accountant was  
8 referring to with reference to an assurance as used in the  
9 second paragraph?

10 A. This is not an audited statement. This is very common  
11 for organizations to not have a CPA put that they're also not  
12 audited.

13 Q. Which means that the accounting firm is not vouching for  
14 the accuracy of the numbers; isn't that right?

15 A. I don't know that's what they're saying. They're saying  
16 it's not-- this has not been audited.

17 Q. What does that mean to you, sir?

18 A. Well, a series of steps and procedures that you must go  
19 through to be certain that the financials are accurate. And  
20 in this particular case, NXIVM's common with many of the  
21 privately held organizations I work with, their books are not  
22 audited-- it's expensive to have your books audited.

23 THE COURT: Is this the same accountants that  
24 signed the unsigned tax returns?

25 MR. SYLVESTER: I am not certain.

1 MR. MCGUIRE: I don't believe so.

2 MR. SYLVESTER: That was later in time.

3 MR. MCGUIRE: That was Dagostino that provided the  
4 signed 1999 return.

5 MR. SYLVESTER: Here's the point, your Honor.

6 Isn't it a fact that the period of time in which  
7 this accountant is working falls smack in the middle of your  
8 damages period?

9 THE WITNESS: Yes.

10 MR. SYLVESTER: Your Honor, I am prepared to hand  
11 up the definitions of what assurance means-- if we wants to  
12 go that far.

13 THE COURT: No. Again, I am trying to get to the  
14 facts behind this.

15 MR. SYLVESTER: The point I am making is--

16 THE COURT: Let me make one comment.

17 MR. SYLVESTER: I apologize.

18 THE COURT: We have three tax returns, correct?  
19 1999, 2000, 2001?

20 THE WITNESS: That's correct. Plus 2002, which was  
21 available shortly thereafter.

22 THE COURT: That's right. So we have a run of tax  
23 returns. We have unaudited financial statements?

24 THE WITNESS: Correct.

25 THE COURT: From the same years or from later

1 years?

2 THE WITNESS: From the same years.

3 THE COURT: Prepared by these folks or prepared by  
4 different people?

5 THE WITNESS: Two separate CPAs.

6 THE COURT: Mr. Sylvester is asking you whether or  
7 not you agree that these CPAs, who compiled accompanying  
8 statements of income as of June 30, 2007, what were the years  
9 that these folks-- how do you pronounce this name? F-R-U-C-I.

10 MR. SYLVESTER: Fruci.

11 THE COURT: The Fruci firm looked at what years for  
12 purposes of giving you financials?

13 THE WITNESS: May I?

14 THE COURT: Yes.

15 THE WITNESS: 1999 it was Dagostino that was  
16 signed. Fiscal 2000 was Fruci unsigned. 2001 is Fruci. And  
17 2002 was Fruci.

18 THE COURT: Okay. And then Fruci says so far you  
19 have financial-- unaudited financials from them-- they have  
20 compiled accompanying statements of income. Are those the  
21 same years they say as of June 3, 2007, sounds if they did  
22 all but one year beginning in 1999. I don't care who wants  
23 to answer this-- everything up to 2007?

24 MR. SYLVESTER: Your Honor, if you take a look at  
25 tab starting 6. 6, 7, 8, 9, 10, 11, 12, 13, 14. All

1 subsequent even tab 15 subsequent tax returns were prepared  
2 by Fruci.

3 THE COURT: Okay.

4 MR. SYLVESTER: If I might ask the witness. Can  
5 you take a look at those later tax returns please.

6 THE COURT: Starting with which tab?

7 MR. SYLVESTER: Tab 6. Before you do that I'll ask  
8 you a question.

9 Q. Sir, did you state in 2013 in a declaration that you  
10 would have like to have seen returns for years other than  
11 1999 2000, 2001?

12 A. Yes.

13 Q. And between 2013, when you rendered the report in 2017,  
14 did the client or Mr. Crockett provide you with any of those  
15 returns?

16 A. No.

17 Q. I didn't hear you? I'm sorry.

18 A. No.

19 Q. And after you rendered your report in February last  
20 year, if I recall you said in that report you would have  
21 preferred to have seen the tax returns for all subsequent  
22 years-- didn't you say that?

23 A. Yes.

24 Q. And since February of last year until today, has Mr.  
25 Crockett or NXIVM provided you with any of those returns?

- 1 A. No.
- 2 Q. Okay. Now, sir, with regard to-- I want to ask you a  
3 question with regard to page 21 of your report.
- 4 A. Okay.
- 5 Q. You identified on page 21 the sales of the NXIVM company  
6 for fiscal year 2006?
- 7 A. Okay.
- 8 Q. What is the number 1234?
- 9 A. [REDACTED]
- 10 Q. And you also identified the gross profits?
- 11 A. Yes.
- 12 Q. And what is that number?
- 13 A. [REDACTED]
- 14 Q. And turn back to the Fruci letter please.
- 15 A. Sorry? Tab 17.
- 16 Q. Yes. Can you turn to page 2 of the Fruci letter?
- 17 A. Okay.
- 18 Q. Is that not an income statement for the fiscal year  
19 ending 2006?
- 20 A. This would be their 2006 fiscal year.
- 21 Q. Fiscal year 2006?
- 22 A. It appears so.
- 23 Q. And those were the numbers that you just gave me of page  
24 21 from your report; isn't it the same year?
- 25 A. Yes.



1 Q. Now, tell me if the numbers in your report are [REDACTED]

2 if it shows up on page 2 of the Fruci letter?

3 A. No.

4 Q. And what about the gross profits. You had in your

5 report [REDACTED] true?

6 A. Yes.

7 Q. And doesn't the Fruci income statements for the very

8 same fiscal year identify gross profits of [REDACTED]

9 A. Yes.

10 Q. Okay. Do you have a calculator or accept my

11 representation that you're off by 32 percent?

12 A. For what?

13 Q. In terms of the gross profits for fiscal year '06?

14 A. I don't know. I have to calculate it.

15 Q. I'll withdraw that.

16 THE COURT: We have all phones.

17 MR. SYLVESTER: I have done it and it's 32

18 percent.

19 Sir, if I can direct your attention-- if you don't

20 mind.

21 Q. This is to Tab 7.

22 A. Okay.

23 Q. I presume you prepared your tax return on your own for

24 year 2005?

25 A. I have accountants do it for me, but yes.

1 Q. Would it be fair to say that you probably signed it  
2 somewhere in April 2006 or thereabouts?

3 A. Yes.

4 Q. Tell me what was the date that the accountant prepared  
5 this 2005 tax return?

6 A. 10/30/13.

7 Q. Did you say 2013?

8 A. Yes.

9 Q. And can you tell me when this one was signed by the  
10 NXIVM?

11 A. I'm not sure. What specific date are you looking for?

12 Q. It says--

13 A. If I understand correctly the CPA was the first  
14 request?

15 Q. Yes, the CPA please.

16 A. Fruci signed it 10/30/13. And your question was then?

17 Q. When was it signed by the taxpayer?

18 A. It's hard to read. It looks like 10/31 2015.

19 Q. And let's turn to Exhibit 8. One was a 2006 return  
20 signed by the accounting firm?

21 A. 12, 3, 2013.

22 Q. And when did the tax preparer sign it?

23 A. February 28, 2014.

24 Q. Excuse me you said 2014?

25 A. Yes.

1 Q. And I could go on and show you others, but my question  
2 sir is, would it have given you some pause that the return  
3 wasn't signed for many, many years after the tax year?

4 MR. MCGUIRE: Objection, your Honor, this is well  
5 beyond the scope of qualifications. Which is what was my  
6 understandings that we're dealing with-- with respect to this  
7 witness.

8 He's already testified that he did not take into  
9 consideration any of these later tax returns in corroboration  
10 with the Court or in a declaration. If we're going to get  
11 back into the question of data relied upon and methodology--  
12 I'll direct him on it.

13 However, my understanding is that the Court  
14 provided this with rulings on qualifications.

15 THE COURT: Well, we're still within the zone of  
16 the reliability of the information. And the practice that  
17 Mr. Sylvester is exploring is relying on data that has been  
18 criticized by federal jurists in the past.

19 I'll permit the question.

20 THE WITNESS: What was your question?

21 Q. I think the question was, you know, I think I made the  
22 points in terms of the dates?

23 THE COURT: No, you were asking whether or not he  
24 was concerned about the--

25 Q. If you had seen-- right, if you had seen the large

1 disparity between the date that was signed and the tax year  
2 would that have given you pause?

3 A. Yes, this would have been a concern.

4 Q. And the other returns as well I presume? Where there  
5 was a disparity? They-- there would have been a concern as  
6 well though, right?

7 A. I am not sure I fully understand that question. Based  
8 upon this 2006 fiscal year with those dates, yes, I would  
9 would-- I would have had a lot of questions.

10 Q. You've said you had a lot of questions, true?

11 A. Sure.

12 Q. And this fiscal year is smack dab in the middle of your  
13 damage periods-- isn't it?

14 A. Yes.

15 Q. Again, to make this point. As far back as 2013, you  
16 were declaring to this Court under oath that you wanted to  
17 see these tax returns true?

18 A. Yes.

19 Q. And when you rendered the report you similarly made the  
20 statement that you wanted to see these returns; isn't that  
21 true?

22 A. Yes.

23 Q. And at no point from 2013 until right this minute has  
24 NXIVM done anything to show you the returns that you were  
25 looking for; isn't that true?

1 A. That I can answer that is right.

2 MR. SYLVESTER: I have nothing further on whether  
3 or not this witness is qualified.

4 THE COURT: I could beat dead horses too. I'll go  
5 back a couple of questions that I've asked you.

6 I'm taking seriously what you said because I think  
7 it is a credible way to go. If you have various ways of  
8 double checking on information given to you, by looking at  
9 another source of similar information and they appear to  
10 harmonize there's a self-proofing?

11 THE WITNESS: You have to be careful but it helps.

12 THE COURT: It helps?

13 THE WITNESS: It helps, yes.

14 THE COURT: And you employed that approach when you  
15 look at the unaudited financial statements for those early  
16 years 99, 2000, 2001 and the late presented 2002?

17 THE WITNESS: Yes.

18 THE COURT: And the financial statements, unaudited  
19 financial statements, and then you had these tax returns?

20 THE WITNESS: That's correct.

21 THE COURT: Which gave you some comfort that you  
22 could rely on those financials when you started working  
23 within the post Franco-- I call it Franco, really it's the  
24 articles that prompted the pleaded-- when I say pleaded this  
25 was advanced in the complaints that, hey, we have this fall

1 off of folks that just didn't go, right?

2 THE WITNESS: Right.

3 THE COURT: Now, you can't however and you will be  
4 troubled now, but the inability to match up financial  
5 statements up to 2007 from Fruci with tax returns related to  
6 those years is, because you really didn't have those tax  
7 returns, correct?

8 THE WITNESS: That's correct.

9 THE COURT: What's presented to you now in the  
10 tab-- I believe Tabs 7 and 8 are tax returns from 2005 and  
11 2006 that show years in between the taxable year and the  
12 final tax return?

13 THE WITNESS: Yes.

14 THE COURT: As far as 2007 goes, whatever is  
15 presented is not signed by anybody, correct?

16 THE WITNESS: Correct.

17 THE COURT: And 2008 there's a lapse of nine years,  
18 correct?

19 THE WITNESS: That's correct.

20 THE COURT: Does that give you some concern about  
21 the reliability of your approach so far it appears to be an  
22 extrapolation of what you could see for earlier years to what  
23 you were asked to look at?

24 THE WITNESS: I would have loved to have had the  
25 additional tax returns.

1 THE COURT: Now you do.

2 THE WITNESS: Now I do. And specifically I  
3 included in my report, I wrote February 3, 2017, if  
4 additional tax returns are presented and available I would  
5 love to be able to look at them and modify my report, if in  
6 fact appropriate-- if that answers your question. I wanted  
7 more data and always wanted more and was hungry for it and  
8 independent data.

9 THE COURT: And in the same ways your numbers are  
10 kind of creeping across your vision-- I'm looking at my empty  
11 jury box and fractious citizens that I am bringing to Newark,  
12 and again I ask you the reliability of the data that you  
13 used, given what clearly is something that got your attention  
14 and those are those time lapses that come and now fresh the  
15 data-- what the devil was going on. Are you now comfortable  
16 looking them in the eye and offering the report without  
17 modifications that you've presented-- up until now?

18 THE WITNESS: I want to answer your question, but  
19 this is first time today-- and I've only been able to glance  
20 at the data that I have had a chance to look at the  
21 additional tax returns. And I really can't answer your  
22 questions unless I look at it in more detail.

23 THE COURT: Fair enough. Fair enough that's fine.  
24 All right--

25 MR. MCGUIRE: Your Honor, perhaps if the Court

1 would ask in the form of hypotheticals which might be  
2 appropriate because he's an expert.

3 THE COURT: Ask it.

4 MR. MCGUIRE: [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 THE WITNESS: I couldn't hear you very well.

8 THE COURT: Come up to the podium which it's hard  
9 to hear from there.

10 MR. MCGUIRE: And late.

11 THE COURT: And late to hear, right.

12 MR. MCGUIRE: I am trying to assist the Court in  
13 terms of a hypothetical. [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 THE WITNESS: [REDACTED]  
19 [REDACTED]

20 BY MR. MCGUIRE:

21 Q. [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 A. [REDACTED]

25 Q. [REDACTED]



1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 A. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 MR. MCGUIRE: Fair enough. Nothing further.

16 THE COURT: Okay. Thank you.

17 MR. SYLVESTER: May I make one point if you don't  
18 mind.

19 THE COURT: Yes.

20 MR. SYLVESTER: I am good at getting back to where  
21 I started. Where we're on the trial and these tax returns  
22 were only provided recently and weren't provided before and I  
23 have them and he doesn't. This is the nub of the problem.  
24 So what am I doing over the next week is figuring this out.  
25 This goes to a core issue. Rule 703, which doesn't permit

1 the expert to rely upon something not in the case. Rule 26--  
2 this was never in the case, nothing Bates stamped, and the  
3 fundamental prejudice and unfairness to me and my client to  
4 be dealing with these things on the fly from a case that was  
5 filed in August of '03. This goes to that fundamental point  
6 of the changing horses not midstream which they're about to  
7 get on the other side of the river and now I have a whole new  
8 theory.

9           This is something that at its core. Can you  
10 imagine sitting with Ms. Salzman and me cross examining her  
11 at deposition to try to determine why there was an eight year  
12 gap between tax years and signing it. I mean could you just  
13 imagine that. I didn't get that opportunity because this  
14 wasn't even part of the case. I am totally beating a dead  
15 horse. Even the exercise of something overnight that's  
16 putting me further behind the eight ball.

17           THE COURT: No.

18           MR. SYLVESTER: This to point out the problem that  
19 I'm alluding to all day and which now I'm pointing out.

20           THE COURT: I have criminal matters in the  
21 morning. And we'll continue this matter tomorrow at 1  
22 o'clock.

23           We will take an early lunch among ourselves and  
24 starting at 1 o'clock everybody. Have brunch or a late  
25 breakfast or hardy 12 noon farmer lunch.

1 Thank you very much for today.

2 MR. MCGUIRE: Thank you.

3 THE COURT: Off the record, Yes?

4 MR. MCGUIRE: Mr. Smith is coming back?

5 THE COURT: Unless you want Mr. Smith, if either  
6 lawyer wants him he's here tomorrow then.

7 MR. SYLVESTER: I do, your Honor.

8 THE COURT: Thank you all. Okay.

9 MR. SYLVESTER: Thank you.

10 MR. MCGUIRE: Thank you.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 06-01051

NXIVM CORPORATION, formerly known as:

EXECUTIVE SUCCESS PROGRAMS, INC. and:

FIRST PRINCIPLES, INC., :

Plaintiffs, :

-against- :

:

:

STEPHANIE FRANCO, et al :

:

:

Defendants. :

x

Newark, New Jersey

January 10, 2018 2:00 p.m.

B E F O R E:

THE HONORABLE KATHARINE S. HAYDEN, U.S.D.J.

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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

s\ RALPH F. FLORIO

Official Court Reporter

I N D E X

WITNESSES:

PAGES:

DONALD SMITH (BY MR. SYLVESTER)

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E X H I B I T S

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SEE ATTACHED INDEXING

THE COURT: Good afternoon.

We're back on the record in the matter of NXIVM Corporation v. Stephanie Franco.

May I have counsel appearances please.

MR. MCGUIRE: Good afternoon, your Honor.

Grant W. McGuire, from the law firm of Tompkins, McGuire, Wachenfeld & Barry, on behalf of the NXIVM plaintiffs.

THE COURT: Good afternoon.

MR. SYLVESTER: Good afternoon, your Honor.

Anthony Sylvester, from the law firm of Sherman Wells Sylvester & Stamelman. And again with me is Anthony Valenziano and Ms. Caitlin Shadek on behalf of Ms. Stephanie Franco.

THE COURT: Okay. Thank you. We are continuing with the testimony of the plaintiff's proffered expert Mr. Donald Smith-- is that correct?

MR. SYLVESTER: It is.

MR. MCGUIRE: That is correct, your Honor.

THE COURT: And is he here?

MR. MCGUIRE: He is here.

THE COURT: Bring him forward then please.

MR. MCGUIRE: Your Honor, if I could ask for a five minute continuance. I've received some information that may prove fruitful to this matter and the Court. I just need five minutes to really digest it, your Honor.

THE COURT: Sure, of course, take your time. It is five after two.

We will adjourn until 2:15, okay.

MR. MCGUIRE: Thank you, it is most appreciated, your Honor.

THE COURT: Okay. Thank you.

MR. SYLVESTER: Thank you, your Honor.

THE COURT: Thank you. Off the record.

(RECESS TAKEN).

THE COURT: Back on the record.

Mr. Smith is here now?

MR. MCGUIRE: Yes, your Honor.

THE COURT: Come forward please. Thank you.

You may be seated. You continue to be under oath and we continue to have cross examination?

MR. SYLVESTER: That is correct.

THE COURT: Off you go then.

MR. SYLVESTER: Thank you, your Honor.

THE COURT: And we're still crossing on qualifications. And I do want to get into-- that Mr. McGuire hasn't really had a chance to at least develop his argument and that we're sort of veering into methodology, and I don't want us to just fail to permit direct on the methodology as well.

MR. SYLVESTER: I understand. And, your Honor, I'm prepared as well to cross on issues of methodology and causation-- the fit which is part of 702 as well as the witness's conclusions regarding gross profits.

But before I get into that, I would like to pick up as to a piece of the examination that was conducted yesterday, and I think your Honor also was involved in the discussion.

THE COURT: All right.

MR. SYLVESTER: Yes.

^ BY MR. SYLVESTER:

Q. Mr. Smith, I am correct that prior to yesterday you had not seen income

tax returns for the years 2004 through 2009; isn't that right?

A. Yes.

Q. And yesterday during your--

THE COURT: Let's put the tabs in.

MR. SYLVESTER: Yes, beginning at Tab 6.

THE COURT: Okay.

Q. This is through Tab 11. I am correct, am I not, sir, that you had not seen the income tax returns which are Tabs 6 through Tabs 11 before yesterday?

A. Without referring to the tabs-- your question before I believe was 2004 through 2009-- is that correct?

Q. Yes.

A. Yes.

Q. Sir, am I also correct, and I think we've established this yesterday, that as far back as the year 2013 it was your desire to review those tax returns-- if they were available, right?

A. I desired that and I requested it several times-- yes.

Q. And, in fact, you said yesterday quite candidly, sir, that the more data the better as far as you're concerned; isn't that right?

A. Yes, right.

Q. When you rendered your report in February of last year, you reiterated your desire consistent with your concept that the more data is better, that you would like to have seen the available tax returns for the years that we've just mentioned-- isn't that right?

A. Yes.

Q. And yesterday I showed you those returns-- true?

A. Yes.

Q. And I believe yesterday you agreed with me that there was disparities,



if you will, between what was in the tax returns and what was in your report; isn't that a fact?

A. Yes.

Q. And isn't it true, sir, that the years that we are talking about-- specifically '04 to '09 are really smack dab in the middle of the heart of your damages model; isn't that true?

A. Yes.

Q. And, sir, I happen to notice that when you walked up to the podium just a minute ago you had with you the binders that had you before you yesterday during your examination; isn't that true?

A. Yes.

Q. And included in those binders, in fact are the tabs that we just mentioned, which are tax returns 2004 to 2009; isn't that true?

A. Yes, I reviewed those last evening.

Q. And is it fair to say that when you left this courtroom yesterday you took with you the binders, true?

A. Yes, I did.

Q. And last evening and through this morning, would it be fair to say that had you an opportunity to review in detail Tabs 6 through 11-- the tax returns at issue?

A. What I did last evening is I sat at my hotel desk and I went through each. I created a spreadsheet, summarizing key elements, comparing the gross sales from the tax returns, the gross sales which were unaudited and which was included in my report-- for each of those years. And some additional years you provided data for that I had not seen yet. And I also did the same for gross margins, both in dollars and in percentages.

I also did put on my spreadsheet the-- by fiscal year the date that the CPA signed preparation of the report. And the date that a NXIVM

officer signed the report. That was my spreadsheet that I did last evening.

Q. And let's take the ladder point first if you don't mind.

With regard to this parity and the date which you mentioned between the year of the return and the date that the CPA prepared it and it was signed by the tax preparer, isn't it true that that gives you great pause?

A. Yes.

Q. All right. And, sir, with regard to the figures that you mentioned that were put on the spreadsheet that you worked on last night at your hotel desk here in Newark; isn't it a fact that that confirmed to your satisfaction that there were disparities between the numbers in your report and what appeared on the tax returns?

A. It varied by year. Some years it was essentially zero and some years it was very significant.

Q. Now, during the-- would you agree with me, that key years in your damage model are the fiscal years 2006 and 2007?

A. Yes.

Q. And isn't it true that for those key years, you determined from your review of the tax returns that there were significant disparities between the numbers in the return and the numbers in your report?

A. Yes.

Q. Now, sir, I think that you probably recall yesterday afternoon the Court-- Her Honor asked you if you understood quite clearly the role and the obligations you have as an expert with regard to a jury that may be empaneled here; do you recall that?

A. Yes.

Q. And I take it, sir, given your long history as a consultant and as an expert that you take those responsibilities as articulated by Her Honor quite seriously?

A. Very seriously. Personal integrity in my business-- especially the consulting business that I described yesterday is absolutely critical.  
Yes.

MR. SYLVESTER: And I appreciate that and I thank you for that.

Q. And along those lines, if you recall the Court asked you if you were comfortable, if called upon as an expert in this case, looking at the jury, looking them in the eye and testifying with certainty as to your findings-- do you recall the Court asking you that?

A. Yes.

Q. Now, sir, based upon what you were able to determine last evening, from your review of the returns which you only first saw yesterday. Are you comfortable serving as an expert, looking at the jury in the eye at a trial and asserting that the numbers in your report are reliable and accurate numbers?

A. I would not be comfortable. I do not have sufficient information at this moment to prepare an economic loss.

MR. SYLVESTER: Your Honor, I have many things to talk about on substance and I know that you want Mr. McGuire to direct this witness on the substance of his report.

THE COURT: May I just follow-up.

MR. SYLVESTER: Thank you.

THE COURT: Following up with your answer, Mr. Smith.

You said, I do not have sufficient information at this moment to prepare an economic loss?

THE WITNESS: Yes.

THE COURT: Okay. I misheard you. Fine.

I don't have a question-- I misheard him.

MR. SYLVESTER: So, your Honor, I think that-- if I might.

I appreciate what your Honor said about the balance of this inquiry relating to the substance of the report, clearly methodology and causation, and that Mr. McGuire would conduct the direct and I would have an opportunity to cross. But since your Honor pointed out at the outset of this afternoon's proceeding that we at the qualification stage.

May I respectfully submit that given what this witness just testified to, that your Honor could make a ruling on qualification based upon his inability, if you will, to say that his numbers are reliable and accurate as it stands right now, based upon his review of information that I only provided to him for the first time yesterday afternoon.

I appreciate that he had saw it for the first time yesterday afternoon. If your Honor wants to make that ruling perhaps we don't need to do the rest.

THE COURT: Well, you know, one of the things that strikes me-- I am not prepare to rule that from what I have heard about his qualifications, Mr. Smith is not qualified, as a sitting here today as an expert. I believe that if you asked me for a pure ruling is that he is qualified to offer an opinion as an expert on loss profits-- in the abstract I would say yeah. I would say yes.

The evidence rule that we are dealing with has a particular provision that I want to ask you about, Mr. Smith, given your candor and your clear commitment to as you put it integrity and how important it is that it is for your professional life, right?

THE WITNESS: Right.

THE COURT: But I've been with you long enough in this crucible to believe that it applies to your personal life as well--right?

THE WITNESS: Absolutely.

THE COURT: 702 says. A witness who is qualified as an expert

by knowledge, skill, experience, training or education, and I've already said that I think you are there. Okay. May testify and form an opinion or otherwise if, A, the expert's scientific technical or other specialized knowledge will help the trier of fact to understand the evidence. Or to determine a fact in issue. B. And these are all conjunctives-- they all have to be satisfied.

THE WITNESS: Yes.

THE COURT: B, the testimony is based on sufficient facts or data. C, the testimony is the product of reliable principles and methods. And D, the expert has reliably applied the principles and methods to the facts of the case.

I'm asking you, do you believe that if you were to-- if I rolled in that jury today you could offer an opinion based on sufficient facts or data?

THE WITNESS: I received significant additional information yesterday.

THE COURT: Right.

THE WITNESS: Tax returns, during the actual period of the economic loss. Some of the years, not all, but some were significantly different. Some of the dates in relation to the numbers of years prepared after the fiscal year-- raises just a number of questions. And for me to develop an economic loss I would be comfortable with I would need to have answers and documents-- of an entire range of subject.

THE COURT: So that that's really the basis for your saying in answer to Mr. Sylvester's question, I would not be comfortable looking the jury in the eye and offer my opinion?

THE WITNESS: Not with-- no, I just had a first look at those tax returns last evening. That is right.

THE COURT: And those tax returns were not provided to you by the plaintiffs in this case?

THE WITNESS: No, they were not.

THE COURT: Correct.

THE WITNESS: No.

THE COURT: And I read your report again last night, armed with the information that I have heard about, and of course I read before, but I really concentrated on where in the report you said I would be-- I asked for tax returns-- they were not provided to me. And I thought to myself, you know, this is not the conventional cover your rear end stuff. This is because this man is trying to be as you said, I love data, and the all lawyers went, we can't even read the data that he loves.

But my point is, I am compelled to find based upon the testimony that you've given that you don't have sufficient facts or data to testify and offer this jury an opinion sitting here today?

THE WITNESS: That's correct.

THE COURT: Okay. Okay. That is the argument you're making.

MR. SYLVESTER: I only wish I had done it in the fashion that you had done it, your Honor. I was taking notes and I know for the next time. That is the argument that I am making.

THE COURT: It really is. And I think that one of the anomalies in this case is the facility with which we can eviscerate expert reports. And I am speaking of my colleagues in the Southern District. Without the benefit of an interaction with the person who authored it. And I frankly learned a little bit about how to deal with this issue. Because the qualifications are really there. And we're not going to get into the methodology. We don't have to because we have a candid, careful, honorable witness. Who happens to have an expertise that is very useful.

So I will dismiss you from further testimony, Mr. Smith. But I will thank you for a lesson in integrity-- if I could be so smaltzy.

THE WITNESS: Thank you very much.

MR. SYLVESTER: Your Honor, if I might. I will join in saying the same to Mr. Smith in that regard.

THE COURT: Thank you very much.

THE WITNESS: Thank you. My pleasure.

THE COURT: Safe back to your Utica. Which I think we will let you leave today.

Off the record.

(PAUSE).

THE COURT: Back on the record. I'm letting Mr. Smith go. Thank you.

MR. SYLVESTER: Your Honor, would it be okay with the Court-- that we take the binders back from you, and we pull out what was not used. But I know that and I think Mr. McGuire will come up and address this. Like, for instance, even in the tax returns I happen to see a social security number.

THE COURT: You have to redact them.

MR. SYLVESTER: Yes. It's more an omnibus issue that Mr. McGuire will address with regard to the confidentiality of some these documents.

THE COURT: Okay.

MR. MCGUIRE: Your Honor, two quick housekeeping issues.

Number one, would be what Mr. Sylvester just previewed. A lot of the materials I wasn't taking notes on as to each and every exhibit, but the financials were almost entirely marked as confidential. I should have probably put something on the record yesterday, but no harm no foul. Just if the record could be temporarily sealed while we just go about the

business of formally filing a motion to seal on that issue. Mr. Sylvester and I worked together on-- probably we've driven Magistrate Waldor crazy with these motions to seal, but we should be able to get that done relatively quickly.

THE COURT: Mr. Florio is skilled at working with counsel as to how to redact the record that ultimately gets filed. And I know that in Mr. Smith's response to the motion to exclude his testimony substantial parts of his certifications were redacted. I am assuming that they relate to hard numbers much as your applications relates. So I will leave it in your hands. But I will not give you a lot of time. All right.

MR. MCGUIRE: Understood.

THE COURT: Figure it out with Mr. Florio when a comfortable time is without any lag time. Okay.

MR. MCGUIRE: Very well.

The second issue speaks to the witnesses that NXIVM had on their witness list. There was some question as to whether or not Nancy Salzman would be testifying next week in the event this matter goes to trial. I have an affirmative answer on that which is no.

THE COURT: She would be the-- I'll ask you. Is she the "other witnesses on damages" that are referred to in the Crockett declaration?

MR. MCGUIRE: Yes. Without the-- and the reason I've paused, your Honor, is that it is dangerous to try to put one self in another's mind, when the other person is a declarant. But that is my best understanding. Yes.

THE COURT: And I think Mr. Sylvester would say, everybody's understanding based on the witness list. What is the witness list? Who is on the witness list?

MR. MCGUIRE: That is a very funny question. I asked the brains



of the operation that--

THE COURT: A moment ago. Because if we could get a representation as to who will testify to what. And-- and it's clear no one else could but Ms. Salzman I need to do just a couple of quick questions with counsel on that issue.

Mr. Sylvester, do you want to say something?

MR. SYLVESTER: Yes. It's easy, your Honor. This is where I step back and I let Mr. Valenziano answer this-- because he knows the answers.

MR. VALENZIANO: Your Honor, in terms of witnesses on-- your Honor, in terms of witnesses on the witness list for NXIVM.

Ms. Salzman was the only witness who identified who actually is employed or an agent of NXIVM.

The other individual was Kristin Keefe who has withdrawn during the December 15th phone call.

The other witnesses were Jeffrey Sutton, who is Justin Frankel's (ph) half brother, who certainly has no knowledge of that.

THE COURT: Give me just a moment. I'm sorry.

Off the record.

(PAUSE).

THE COURT: Back on the record. You were speaking about Jeffrey Sutton-- who would not know-- I agree.

MR. VALENZIANO: Yes. And also running down the list. Obviously, Ms. Franco would have no knowledge.

Mr. Hochman (ph), who is one of the authors of the articles that were posted on the Ross websites and would be read in by us. And obviously he has no information.

Mr. Ross himself would have no information. And then Michael Sutton, who is Jeffrey's brother and Stephanie's half brother, who obviously

has no information. He would be done by a read-in.

So, your Honor, there's no witnesses on this list who could talk about that besides Ms. Salzman.

THE COURT: Yes. And from the information that I have at hand, Nancy Salzman is the company's CEO and obviously she would have this kind of information. All right.

MR. VALENZIANO: Thank you, your Honor.

MR. SYLVESTER: Your Honor, is it possible to just to amplify this point also.

THE COURT: Sure.

MS. SHADEK: Yes, your Honor.

I just wanted to reiterate the point that Mr. Sylvester made yesterday, that on the exhibit list which has been paired down to six exhibits.

We want to reiterate that not a single one of them has as to and relates to damages or to loss profits.

So to the extent that some additional witness who could testify that has not been represented, there's not a single exhibit listed that could relate to an issue of damages.

THE COURT: Insofar as opposing counsel that is interpreting or in making inferences from the exhibits, can you confirm that characterization of the exhibit list, Mr. McGuire?

MR. MCGUIRE: Well--

THE COURT: Is that a fair characterization?

MR. MCGUIRE: I would agree with the Court.

MS. SHADEK: Thank you.

THE COURT: Thank you.

We're inching toward the issue of whether or not this case must

be dismissed for lack of prosecution. I have a question. The representation that Nancy Salzman is not coming has been made by Mr. McGuire. And you have authorization to make that?

MR. MCGUIRE: I do.

THE COURT: I would make one point to counsel and just see if it still holds.

In researching this case and looking at the whole issue of 701 and 702 testimony. And I'm kind of blurring the two together. For this purpose, in the case of Lightning Lube-- all the way back to 1993.

Off the record.

(PAUSE).

THE COURT: Back on the record.

Lightning Lube v. Witco, 4 F.3d, 1153, 1175, 76 for the pin cite-- Third Circuit 1993.

In that case, it was decided by the Third Circuit that the trial judge did not abuse its discretion, in permitting the business owner to offer an opinion as to loss profits. Albeit, the business owner was not an expert and so on.

Ms. Salzman therefore is admissable as a witness to offer an opinion, now that Mr. Smith is no longer the expert. And I want to make that very clear, she can in fact testify to that-- it's almost an advisory ruling that I am making but it's the law of the circuit.

Is Ms. Salzman aware that her presence is such that she could in fact fill the gap that has occurred today?

MR. MCGUIRE: Again, your Honor, you hear the word candor with the Court a great deal, which means a great deal to me.

The fact of the matter is that I have not had direct communications with Ms. Salzman. I also recognize that I am tiptoeing around the

attorney/client privilege. But I do not wish to make any representations to the Court.

I have made communications with people who have advised that Ms. Salzman is quote unquote in the loop. This information, as to Ms. Salzman not being present to testify next Tuesday, was conveyed both with the possibility that Mr. Smith would be testifying as an expert witness as well as with the-- not preconceived notion but the possibility.

THE COURT: Possibility.

MR. MCGUIRE: Possibility that he would not be testifying as has happened. So my client is armed with information under both possibilities.

THE COURT: Is your client-- I am not going to ask you a question that I know what the answer is.

I don't have a stipulation of dismissal from a client by all intensive purposes would give a stipulation of dismissal under the circumstances. I have oddly enough a representation from an officer of the court standing at the podium, Mr. Sylvester, that if there is a voluntary dismissal of the complaint there will be a voluntary dismissal of the counterclaim.

MR. SYLVESTER: That's correct.

THE COURT: Okay. In the absence of either a certification from Nancy Salzman, I know I could testify in this issue. I know that without damages being proven my case is not prosecutable. I know, I know, I know and I'm not going to be there anyway. Or a stipulation of dismissal. I want to see you all. I will have my jurors downstairs or across the hall muttering. I have told you that there will be muttering, and we'll see what happens on Wednesday.

I would prefer to have under these grave circumstances effecting a 15 year litigation that Ms. Salzman has been heavily involved in-- I rather

have her feet on the floor or not on the floor, as opposed to I think a very careful and candid representation from a lawyer whom I have great respect. I know you don't want to lead me into error and I don't want to put you on the spot.

So we keep our date.

MR. SYLVESTER: Your Honor, yes, to things. First, I believe it is a Tuesday date.

THE COURT: I have to change it to Wednesday.

MR. SYLVESTER: Okay. That's fine. That's good. But secondly, there's just another issue which I would like to raise. Without running the risk of wearing out my welcome I do want to make would be point. And it is in the context of renewal of the application for dismissal on the following point.

What Ms. Salzman could testify about is not in fact anything that Mr. Smith could testify about. She has made her bed with regard to her view of damages. And that is Exhibits A, B and C. She was 30(b)(6) on this issue. She testified under oath already that the entirety of the universe of damages that NXIVM was seeking amounted to what flowed from Exhibits A, B and C. There is a motion before your Honor with regard to precluding that because a record has firmly been established that there is no evidence that anyone of Exhibits A, B and C, in fact stopped going to NXIVM or refused to go. So there is no evidence of damage in the record-- pursuant to her own testimony.

One other thing, your Honor. That is that the exhibit list no longer-- does not have on it Exhibits A, B and C.

So I just don't want to blurt a line. She couldn't come in and step in the shoes Mr. Smith. Her theory is something that is entirely different.

THE COURT: All of that is pretrial motions with the jurors cooling their heels after they have been chosen to sit on the trial.

I will not deprive you of the ability to make that point.

MR. SYLVESTER: Thank you.

THE COURT: Thank you very for your hard work today.

Thank you everybody.

MR. SYLVESTER: Thank you.

MR. MCGUIRE: Thank you, your Honor.